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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

No.

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("PCA"), and Georgia-Pacific Corporation ("Georgia-Pacific"), respectfully pray that a writ of certiorari issue to review the judgment entered October 30, 1979 of the United States Court of Appeals for the Fifth Circuit.

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[1] The 133 respondents are listed in Appendix A hereto.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit, "not to be published," appears in Appendix B hereto,[2] and that of the United States District Court for the Southern District of Texas, reported at 1979-1 Trade Cases (CCH) ¶ 62,689, appears in Appendix C hereto.[3]

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 30, 1979, and this petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether defendants in antitrust cases may assert rights of contribution.

Statement of the Case

1. History of the Litigation

Petitioners are three of 37 corrugated container manufacturers named as defendants in one or more of 55 treble damage antitrust actions alleging an eighteen-year nation-

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[2] In the Court of Appeals, this case was styled *In re Corrugated Container Antitrust Litigation: Adams Extract Company, et al., Plaintiffs-Appellees* v. *Alton Box Board Company, et al., Defendants; Westvaco Corporation, Packaging Corporation of America, and Georgia-Pacific Corporation, Defendants-Appellants; Boise Cascade Corporation, et al., Defendants-Appellees,* No. 79-2439 (*"Corrugated"*).

[3] In the District Court, this case is styled *In re Corrugated Container Antitrust Litigation,* M.D.L. 310.

wide conspiracy to fix, raise, maintain and stabilize the prices of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation,* M.D.L. 310 (S.D. Tex.) ("M.D.L. 310").

The civil lawsuits were precipitated by a federal Grand Jury investigation of the corrugated industry which culminated in price-fixing indictments[4] against 14 corrugated container manufacturers and 26 individuals. All of the defendants that stood trial in the criminal cases were acquitted.

Petitioners herein were not indicted. However, before the Grand Jury had even completed its investigation, a total of 40 private civil actions were commenced against 37 defendants, including petitioners and 20 other unindicted manufacturers.[5]

On September 6, 1978, the District Court certified in M.D.L. 310 a class of all purchasers of corrugated containers or sheets from defendants during January 1, 1960 to January 25, 1978, estimated to include 300,000 members. *In re Corrugated Container Antitrust Litigation,* 80 F.R.D. 244 (S.D. Tex.), *mandamus denied,* No. 78-3684 (5th Cir. Dec. 29, 1978). Certain class representatives estimated treble damages to be as high as $5.9 billion.[6] Thus, the potential liability that confronted each defendant was staggering.

The pressures created by the enormous damage exposure resulted in an unprecedented five-week settlement

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[4] *United States* v. *International Paper Co., et al.,* Crim. No. H-78-11 and *United States* v. *Boise Cascade Corp., et al.,* Crim. No. H-78-12 (S.D. Tex. Jan. 25, 1978).

[5] Indeed, petitioner Georgia-Pacific was later identified by the Government as a *victim* of the alleged criminal conspiracy.

[6] Record on Appeal ("R."), Vol. I, Docket Entry No. 645 (Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements, at 27).

"stampede" during late December 1978 and January 1979. During this brief period, twenty-four defendants collectively paid more than $288 million in 22 separate settlements. This occurred before even one deposition had been taken in M.D.L. 310.

With each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. (Appendix D) Plaintiffs were able to escalate their settlement demands because in the absence of contribution the exposure faced by each non-settling defendant is increased with each successive settlement.

Subsequently, additional defendants settled, bringing the total amount paid in settlement to over $300 million. This is said to be the largest settlement in the history of antitrust litigation. *See In re Corrugated Container Antitrust Litigation,* 1979-1 Trade Cases (CCH) ¶ 62,690 (S.D. Tex. May 30, 1979) (preliminary approval of settlements). The settling defendants represent over 80 percent of the market.

Without rights of contribution, the non-settling defendants individually face exposure to industry-wide damages asserted to be in excess of $5 billion.

2. The Decisions Below in the District Court and the Fifth Circuit

(a) Motions by Petitioners

On December 7, 1978, prior to the settlement stampede, petitioner Westvaco moved for leave to amend its answer to the Unified and Consolidated Complaint in M.D.L. 310 to assert contribution by way of cross-claims against the only two defendants which had then settled.[7] On March

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[7] R., Vol. I, 117-118.

1, 1979, Westvaco filed an amended motion seeking leave to assert contribution cross-claims against all settling defendants and an affirmative defense alleging that by virtue of the settlements plaintiffs had waived that portion of their claims fairly allocable to settling defendants ("claim reduction").[8] Motions similar to Westvaco's were subsequently filed in M.D.L. 310 on behalf of petitioners Georgia-Pacific and PCA.[9]

(b) The District Court's Decision

On May 30, 1979, the District Court entered Pretrial Order No. 13 in M.D.L. 310 (Appendix E), denying petitioners' motions to assert contribution by cross-claims and claim reduction by affirmative defenses, and filed an accompanying Memorandum Opinion. (Appendix C) Finding no just reason for delay, the District Court directed the entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure with respect to the denial of petitioners' cross-claims. (Appendix E, ¶ 1)

(c) Appeals to and Decisions of the Fifth Circuit

All three petitioners appealed from the denial of their cross-claims. Petitioners Westvaco and PCA also appealed from the denial of their affirmative defenses of claim reduction. On July 19, 1979, the Court of Appeals for the Fifth Circuit granted the motion of certain appellees to expedite the appeals.

On October 16, 1979, a divided Fifth Circuit panel in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc rehearing denied* (Nov. 29, 1979), held that there were no rights of contribution for antitrust defendants.

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[8] R., Vol. II, 208-12.

[9] R., Vol. II, 378-80, 401-08.

Thereafter, the Fifth Circuit panel which had heard argument in *Corrugated* accepted without analysis the *Abraham* decision as controlling authority and on October 30, 1979 affirmed the District Court's denial of petitioners' cross-claims for contribution. (Appendix B) In addition, the Court dismissed appeals from petitioners' motions seeking contribution by way of the affirmative defense of claim reduction on the grounds that the District Court's order with respect to claim reduction was not appealable. (Appendix B)

Reasons for Granting the Writ

The reasons for granting the writ are (i) there is a conflict among the Courts of Appeals with respect to the application of contribution in antitrust cases and (ii) the issue of contribution raises important questions of federal law which have not been, but should be, settled by this Court.

1. There Is A Conflict Among The Courts Of Appeals

Prior to 1979, no United States Court of Appeals had decided the issue of contribution rights in antitrust cases. In the past ten months, however, this important issue of federal antitrust common law has generated in the appellate courts three majority and three dissenting opinions and two summary affirmances. As will be demonstrated below, a clear split of authority has emerged between the Court of Appeals for the Eighth Circuit and the Courts of Appeals for the Fifth and Tenth Circuits. Accordingly, resolution of the contribution issue by this Court is both appropriate and timely.

In *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979) (*"Beauty Supply"*), the Eighth Circuit, the first federal appellate court to decide

the issue, held unequivocally that fairness requires the application of contribution in antitrust cases. The Court refused to dismiss a third-party complaint for contribution against an alleged joint wrongdoer, not named by the plaintiff in the original lawsuit, and in so doing held:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer. . . .
>
> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.

594 F.2d at 1185-86.

The Eighth Circuit in *Beauty Supply* also recognized that contribution will promote the deterrent policies of the antitrust laws:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

594 F.2d at 1185. The court rejected each of the arguments raised against contribution, and, in particular, noted that contribution would not undermine the judicial policy favoring settlements because "the court should be able to fashion a rule of contribution which will protect the rights of settling defendants." 594 F.2d at 1184.[10]

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[10] This can be accomplished by claim reduction. Thus, the court in *Little Rock School Dist.* v. *Borden, Inc.*, Nos. LR-76-C-41, LR-C-77-126, and LR-C-77-108 (E.D. Ark. Oct. 1, 1979), reported in ATRR (BNA), A-30 (Nov. 1, 1979), held that the rights of contribution recognized in *Beauty Supply* require the application of claim reduction to an antitrust settlement, which "if the settle-

(footnote continued on following page)

Thereafter, panels of the Fifth and Tenth Circuits expressly declined to follow *Beauty Supply,* holding that contribution is not available in antitrust cases.

In *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.,* 604 F.2d 897 (5th Cir.), *en banc rehearing denied* (Nov. 29, 1979) (*"Abraham"*), the Fifth Circuit[11] rejected contribution for antitrust defendants principally on the grounds that the deterrent effects of the antitrust laws were best furthered by a federal common law rule of no-contribution, an argument rejected in *Beauty Supply* (594 F.2d at 1185) and criticized by the dissent in *Abraham* (604 F.2d at 907). The *Abraham* majority based its conclusion upon its observation that deterrence is enhanced by the threat of increased liability for some even if others go scot free. 604 F.2d at 901. Petitioners submit this was an erroneous evaluation of the deterrent effects of a no-contribution rule.

In *Olson Farms, Inc.* v. *Safeway Stores, Inc.,* 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. Nov. 8, 1979), *petition for en banc rehearing filed* (Nov. 23, 1979) (*"Olson Farms"*), as in *Abraham,* a divided Tenth Circuit panel expressly refused to follow *Beauty Supply* and held that there was no right of contribution in antitrust cases as a matter of federal common law. 1979-2 Trade Cases ¶ 62,995, at 79,702-04.

(footnote continued from preceding page)

ment is to be approved, must release non-settling defendants from liability for the settling defendant's actions." Claim reduction is widely recognized as a fair means of effectuating contribution without interfering with settlements. *See, e.g., Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1967); *Judson* v. *Peoples Bank & Trust Co.,* 17 N.J. 67, 93, 110 A.2d 24, 36 (1954) (opinion by Mr. Justice, then Judge, Brennan).

[11] In *Corrugated* and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.,* 1979-2 Trade Cases (CCH) ¶ 63,021 (5th Cir. Nov. 26, 1979), the Fifth Circuit panels merely followed the *Abraham* decision.

In *Olson Farms,* contribution was sought by Olson Farms, Inc. ("Olson"), the sole defendant in an earlier price-fixing action, after it had satisfied a $2.4 million judgment for damages attributable not only to Olson's purchases but also to purchases by four additional alleged co-conspirators, none of which had been sued in the earlier action. Olson was responsible for only 11 percent of the purchases for which damages were awarded. 1979-2 Trade Cases ¶ 62,995, at 79,700. Because contribution was denied in *Olson Farms,* co-conspirators responsible for 89 percent of the damages escaped "scot free," precisely the result the Eighth Circuit in *Beauty Supply* held should be avoided.

Dissenting in *Olson Farms,* Judge Holloway agreed with the result reached in *Beauty Supply* and concluded that "the deterrent policies of the antitrust statutes will be significantly frustrated" by the absence of contribution. 1979-2 Trade Cases ¶ 62,995, at 79,707. He further noted:

> I agree . . . with the Eighth Circuit that the deciding factor should be fairness between the parties. . . . The result of imposing the entire treble damages liability on one defendant while denying him any right to seek contribution from others jointly involved with him in the wrong, is too extreme for me.

Id.

Thus, the Courts of Appeals and the judges on various panels have disagreed among themselves on the question of whether there should be contribution in antitrust cases and have also disagreed on the basic policy considerations underlying the resolution of this important issue.

The absence of uniformity of decision among the federal appellate courts will lead to confusion, uncertainty, injustice and "forum-shopping." For example, the selection of a transferee forum in multidistrict antitrust cases by the Judicial Panel on Multidistrict Litigation may substantially, albeit inadvertently, affect the rights of parties

depending on whether or not contribution is available in the forum chosen. In addition, antitrust plaintiffs may avoid the Eighth Circuit, or other circuits which are likely to follow *Beauty Supply*. *See Heizer Corp.* v. *Ross,* 601 F.2d 330, 332 (7th Cir. 1979) (citing *Beauty Supply* with approval).

Accordingly, it is respectfully submitted that this Court should grant a writ of certiorari and eliminate this conflict among the Circuits.

2. The Issue Of Contribution Raises Important Questions Of Federal Law Which Have Not Been But Should Be Settled By This Court

The decision of the Eighth Circuit in *Beauty Supply* adopting contribution in antitrust cases reflects the growing awareness on the part of the federal judiciary that contribution is essential to ensure fair and just treatment of defendants. Thus, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974), this Court unanimously upheld a right of contribution in non-collision maritime cases. Recognizing that contribution rests upon principles of fairness, this Court held:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

Id. at 111.

In *Heizer Corp.* v. *Ross,* 601 F.2d 330 (7th Cir. 1979), citing *Beauty Supply* with approval and quoting from it at length, the Seventh Circuit unanimously held that a defendant may assert a third-party claim for contribution in a securities fraud action brought under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Viewing the issue as one of "federal common

law," the court held that contribution will result in a "'more equal distribution of justice'" (quoting from *Cooper Stevedoring*) and will promote the deterrent policies of the federal securities laws. 601 F.2d at 332.[12]

The application of contribution to ensure fundamental fairness is particularly appropriate in antitrust cases. The threat of class or industry-wide damage claims, in the absence of contribution, confronts each defendant with enormous damage exposure far out of proportion to its own acts. This in effect makes it extremely hazardous to defend on the merits and results in some wrongdoers going "scot free" or receiving a preferential or "sweetheart" settlement unrelated to the merits of the case.

Indeed, this unfairness is dramatically highlighted in *Corrugated* and *Olson Farms,* which demonstrate respectively (i) extreme settlement coercion and (ii) inequitable allocation of liability.

(a) Extreme Settlement Coercion

This Court and other courts have expressed increasing concern that the aggregation of damage claims in large class actions may coerce settlements from defendants and force them to abandon meritorious defenses. Thus, in *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978), this Court observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

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[12] *See also Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (contribution in airline disaster cases); *Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1967) (Virgin Islands negligence cases); *Martello* v. *Hawley,* 300 F.2d 721 (D.C. Cir. 1962) (District of Columbia negligence cases); Corbett, *Apportionment of Damages and Contribution Among Co-conspirators in Antitrust Treble Damage Actions,* 31 Fordham L. Rev. 111 (1962).

Id. at 476. *See Hooley* v. *Red Carpet Corp. of America,* 1975 Trade Cases (CCH) ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed,* 549 F.2d 643 (9th Cir. 1977) (The enormous risk of classwide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not.") *See also Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

Settlement coercion has become a reality in M.D.L. 310. As noted above, in a five-week settlement stampede, 24 defendants paid more than $288 million to settle class plaintiffs' multibillion dollar claims.

As a result of plaintiffs' escalating settlement demands and the coercive atmosphere created by the enormous damage exposure, there were many examples where the amount of settlement had no relationship to the merits of the case against the settling defendant, but was entirely determined by the timing of other settlements. For example, one indicted defendant—The Continental Group—settled at a rate six and one-half times the rate paid by an earlier settling indicted defendant, International Paper (Appendix D), even though International Paper pleaded *nolo contendere* to the same felony indictment and Continental was later acquitted by the jury.

One of the unindicted defendants in M.D.L. 310 that surrendered to plaintiffs' extortionate settlement demands was forced to pay an amount equal to its after-tax profits for three and one-half years and to close one of its plants, laying off 200 workers.[13] (Appendix F, at F-2). Similarly,

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[13] In *Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 573 (3d Cir. 1979), the Court of Appeals for the Third Circuit recently cautioned against judicial sanctioning of such "overkill" by stating:

> Notwithstanding the seriousness of the *per se* violation present

(footnote continued on following page)

another unindicted defendant was forced to settle to avoid being driven out of business by the loss of credit and financing which would have resulted from its exposure to such staggering damages. (Appendix G)

The District Court in recognizing the "inherent" coerciveness resulting from the settlements in M.D.L. 310 said:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable. . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.*

(Appendix C, at C-2) (emphasis added).

A $5 billion potential liability is by any standard enormous, and could have drastic impact on any litigant.[14] Petitioners submit that coercion, intimidation and blackmail should never be countenanced. The right to trial may be rendered meaningless by a system which forces defendants to settle cases at exorbitant levels without regard to the merits. Accordingly, the District Court and the Fifth Circuit should have recognized rights of contribution in M.D.L. 310.

(footnote continued from preceding page)

> in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws.

Id. at 586-87.

[14] If indeed there had been a conspiracy to fix prices, which is vigorously denied, liability for treble damages based on each defendant's sales is more than adequate to satisfy the deterrent policies of the antitrust laws.

(b) Inequitable Allocation of Liability

This Court has recognized that an equitable division of damages is preferable to a system which results in disproportionate liability. Thus, in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court stated:

> That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all.

Id. at 406.

The facts in *Olson Farms* demonstrate the gross inequity of the allocation of liability in the absence of contribution. Olson was forced to bear sole responsibility for a $2.4 million verdict, even though it made no more than 11 percent of the purchases upon which damages were based. Four other alleged co-conspirators responsible for 89 percent of the purchases went "scot free," clearly an inequitable result.

In sum, a no-contribution rule in antitrust cases permits alleged wrongdoers to go "scot free," coerces settlements, unfairly interferes with a defendant's right to prove its innocence, and results in inequitable allocation of liability.

Contribution will ensure the fair enforcement of the antitrust laws and promote deterrence. The resolution of the contribution issue will affect every civil antitrust case. Accordingly, this petition presents important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 20, 1979

Respectfully submitted,

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Appendices

APPENDIX A

List of Respondents

Plaintiffs-Respondents:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.

Plaintiffs-Respondents:

Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.

Plaintiffs-Respondents:

The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

Defendants-Respondents:

Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Weyerhaeuser Company
Willamette Industries

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2439

[DO NOT PUBLISH]

In Re CORRUGATED CONTAINER ANTITRUST LITIGATION

ADAMS EXTRACT COMPANY, ET AL.,

Plaintiffs-Appellees,

versus

ALTON BOX BOARD COMPANY, ET AL.,

Defendants,

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
and GEORGIA-PACIFIC CORPORATION,

Defendants-Appellants,

BOISE CASCADE CORPORATION, ET AL.,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(OCTOBER 30, 1979)

Before FAY, RUBIN and HATCHETT, Circuit Judges.

PER CURIAM:

This massive class action multi-party litigation is before us on an interlocutory basis with two questions being presented. The first question is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. The second question is whether an antitrust defendant may raise an affirmative defense of claim reduction. The district court answered both questions in the negative by denying motions to assert cross-claims for contribution and motions to amend answers by including the affirmative defense of claim reduction.

The question of the right of contribution under the federal antitrust laws has been answered by another panel of our court in Abraham Construction Corporation v. Texas Industries, Inc., —— F.2d —— (5th Cir. 1979). It was held that there is no such right.

We find that the second question dealing with claim reduction is not properly before us. Although the district court did enter an appropriate final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the cross-claims (right of contribution), it refused to do so as to the affirmative defense (claim reduction). Under these circumstances we have no jurisdiction to consider this issue.

The ruling of the district court on the motions to file cross-claims (right of contribution) is AFFIRMED. The appeal from the order denying the requests to amend various answers to include the affirmative defense (claim reduction) is DISMISSED for lack of jurisdiction.

APPENDIX C

Filed
May 30, 1979

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
CORRUGATED CONTAINER } M.D.L. No. 310
ANTITRUST LITIGATION

Memorandum Opinion

SINGLETON, D. J.: On May 16, 1979, a pretrial hearing was held before this court on the motions of Westvaco, Packaging Corporation of America, Georgia-Pacific, and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class. The question presented by these motions is whether, in an antitrust action such as this, contribution among defendants is proper. This question has been very thoroughly briefed and argued. It is the conclusion of the court, after careful consideration of all the arguments presented, that such a claim would not be proper in this case.

The threshold question is whether contribution should be allowed in any antitrust case brought under the federal laws. The Eighth Circuit, in the recent case of *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 1979-1 TRADE CASES ¶ 62,485 (8th Cir. 1979), has allowed contribution in an antitrust action; no other circuit has done so. In fact, the law has appeared uniformly contrary to the position advanced by Westvaco. *Goldlawr, Inc.* v. *Shubert* [1960 TRADE CASES ¶ 69,623], 276 F.2d 614, 616 (3d Cir. 1960); *Olson Farms, Inc.* v. *Safe-*

way Stores, Inc., 1977-2 TRADE CASES ¶ 61,698 (D. Utah 1977); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 TRADE CASES ¶ 61,533 (N.D. Calif. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969). In recent years, however, it is argued that a trend towards allowing contribution can be discerned. Two cases are currently on appeal before the Fifth Circuit which may clarify this point, *Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 78-1788, and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346; and it has been suggested that this court defer ruling on this question until it has the benefit of that clarification.

It is the court's conclusion, however, that contribution would be inappropriate in these cases even should it be proper in some federal antitrust cases, and for that reason the court will not delay its ruling.

[*Impact on Late or Non-Settling Defendant*]

It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is undisputable—the estimates of total damages in these cases range from just under two hundred million dollars to over one billion dollars, and of course any jury verdict would be subject to the trebling provisions of the Act. Twenty-three defendants, representing approximately 80% of the market, have entered into settlement agreements for a total sum of almost three hundred million dollars. Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. Movants here seek a means to insure that they will not be ultimately liable for more than their market share, or

perhaps than their percentage of culpability, in the event they go to trial and lose.

[*Management Problems*]

On the other hand, the settling defendants and class plaintiffs urge that allowing contribution in any case such as this will make settlements impossible to achieve and will thereby contribute to the already notorious complexity and unmanageability of antitrust cases. Defendants have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants. Further complications to the efficient management of a suit such as this would arise from the processing of the many possible cross-claims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of *United States of America* v. *International Paper, et al.* and *United States of America* v. *Boise Cascade, et al.;* those cases involved the prosecution of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would

be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in *Professional Beauty Supply* that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. 1979-1 TRADE CASES ¶ 62,485 at 76,852.

[*Intentional Torts*]

In addition to the management problems such a rule would present, the court finds Westvaco's arguments unpersuasive in the context of intentional torts. The court notes that even in jurisdictions which allow contribution among joint tortfeasors it is usual to restrict such recovery to negligent joint tortfeasors. The deterrent policies underlying the Sherman and Clayton Acts would appear to be best served by retaining a rule which can result in any defendant found to have engaged in such intentional wrongful acts being held liable for the full sum of injuries caused by its acts and those of its partners. It must, of course, be borne in mind at all times that a defendant who is found not to be an intentional violator of the antitrust laws will not pay a penny damages.

[*Retrospective Use of Contribution*]

For these reasons, the court does not feel that contribution should be allowed in any such antitrust case as this. If, however, the rule were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class and in undertaking joint defense efforts

which may have worked very substantially to their detriment should those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross-claims now. The Supreme Court has listed three factors to consider on the retroactivity of a new rule of law: that it work a substantial change in law upon which parties may have relied; that its policy be furthered by retrospective application; and that such application not be unfair. *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106-07 (1971). In applying these three factors to the case in hand, it is clear that a holding by this court now, or by the Fifth Circuit on the appeals before it, that contribution claims are proper under federal antitrust law would be a substantial departure from existing law. If such a rule is ultimately effectuated, the policy behind it must be one of fairness to non-settling defendants; perhaps it could be argued that that policy would be favored by retrospective application, but in this court's view fairness does not require allowing non-settling defendants to participate in joint defense efforts and use information gained there against those who have chosen to settle, in reliance on the then current state of the law. As to the third factor it seems unfair to all parties to change the rules underlying settlement in so complex a case at this stage of the litigation. Settling defendants have paid three hundred million dollars to buy their peace. Almost a year has passed since the first settlement agreement was reached. The settling defendants, under the terms of their settlements, have been cooperating with class plaintiffs in their discovery. As has been mentioned, all defendants, at this court's request, participated in joint defense work. It would be inequitable to apply such a rule retroactively to this case.

For these reasons, the motions of the several non-settling defendants to amend their answer to assert cross-claims for contribution are Denied.

APPENDIX D

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

Settlements Through January 1979

Settling Defendants (Listed by categories in approx. order of Settlement)	*The % of Defendants' Market*	*Approximate Dollar Amount per % point of defendant's market share*	*Amount Paid In Settlement*
FELONY INDICTEES			
1. International Paper	8.3	$1.00 million	$ 8,300,000
2. Champion International Hoerner Waldorf	5.36	$4.50 million	$24,120,000
3. Weyerhaeuser	7.83	$5.00 million	$39,150,000
4. Owens-Illinois	5.45	$6.00 million	$32,700,000
5. Olinkraft	1.225	$6.00 million	$ 7,350,000
6. Continental Group	4.22	$6.50 million	$27,430,000
MISDEMEANOR INDICTEES			
1. Boise Cascade	2.826	$3.50 million	$ 9,891,000
2. Container Corp. of America	8.56	$4.00 million	$34,240,000
3. Inland Container	7.29	$4.75 million	$34,627,500
4. St. Joe Paper	2.625	$4.75 million	$12,468,750
5. Stone Container	3.055	$4.75 million	$14,511,250
UNINDICTED			
1. St. Regis Paper	3.97	$ .43 million	$ 1,700,000
2. Union Camp	3.70	$2.00 million	$ 7,400,000
3. Diamond International	.50	$2.00 million	$ 1,000,000
4. Dura-Containers	.375	$2.00 million	$ 750,000
5. Chesapeake	1.26	$2.40 million	$ 3,024,000
6. Longview Fibre	2.58	$2.50 million	$ 6,450,000
7. Willamette Industries/ Western Kraft East/ Corco	4.18	$2.70 million	$11,286,000
8. Menasha	1.67	$2.75 million	$ 4,592,250
9. MacMillan Bloedel MacMillan Bloedel Containers	2.11	$4.00 million	$ 8,440,000
10. U.S. Corrugated-Fibre Box	.767	$4.00 million	$ 3,069,120
11. Green Bay Packaging	1.71	$3.25 million	$ 5,557,500

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION	M.D.L. No. 310 (All Cases)

Filed
May 30, 1979

PRETRIAL ORDER NO. 13

On May 16, 1979, a pretrial conference was held before the court, at which counsel were furnished an opportunity to present arguments, proposals, and comments to the court on the numerous motions pending. After giving careful consideration to all the memoranda, briefs, and arguments presented, the court enters the following orders:

1. Various non-settling defendants have filed motions for leave to file cross-claims for contribution against settling defendants. This question has been very thoroughly briefed by all concerned and the court has concluded that these motions should be DENIED. The reasons for this decision are set forth in the attached memorandum, which is incorporated herein. All cross-claims for contribution which have been filed are dismissed with prejudice; and there being no just reason for delay, this decision is entered as a final judgment pursuant to Rule 54(b), F.R.C.P.

2. Various non-settling defendants have requested leave to file amended or supplemental answers which would set forth as an affirmative defense plaintiffs' waiver of so much of their total claim as could be fairly allocated to the settling defendants. The court finds no rule of law

that would prevent an injured plaintiff from recovering all his proven damages from any non-settling joint intentional tortfeasor, less the amounts actually paid in settlement by other joint tortfeasors. The cases dealing with negligent joint tortfeasors in other areas of law are not controlling. Therefore these motions are DENIED.

[¶¶ 3-10 omitted]

DONE at Houston, Texas, this 30th day of May, 1979.

/S/ JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Corrugated Container Antitrust Litigation	
This Document Relates To: ALL ACTIONS EXCEPT: CANTRELL & COCHRANE, INC. (C.A. No. H-79-87) DEAN FOODS COMPANY, ET AL (C.A. No. H-78-2004) DRAPER-KING COLE, INC., ET AL (C.A. No. H-78-1226) FRANKLIN CONTAINER CORP., ET AL (C.A. No. H-78-671) IOWA BEEF PROCESSORS, INC. (C.A. No. H-78-1263) ITT CONTINENTAL BAKING CO., ET AL (C.A. No. H-78-376) SUNMARK, INC. (C.A. No. H-78-1815) UNITED FARMERS COOPERATIVE, INC., ET AL (C.A. No. H-77-2158) UNITED FOODS, INC., ET AL (C.A. No. H-78-4)	M.D.L. No. 310

SUPPLEMENTAL STATEMENT OF U.S. CORRUGATED FIBRE-BOX COMPANY IN SUPPORT OF APPROVAL OF PROPOSED SETTLEMENT

This memorandum is submitted by Defendant U. S. Corrugated Fibre-Box Company (hereinafter called U.S.C.)

as a supplement to what has heretofore been filed on behalf of all settling Defendants and the Plaintiffs.

I. *Effect of Settlement Upon U.S.C.*

Even though U.S.C. was not indicted for either a felony or misdemeanor violation of the antitrust laws, Plaintiffs' attorneys have exacted from it $4,000,000.00 per percentage share of the market, resulting in U.S.C.'s paying and agreeing to pay the total sum of $3,069,120.00 to the Escrow agent. This settlement formula is the highest used to determine setlement amounts of any unindicted Defendant and, in some instances, much higher than indicted Defendants. In fact, the amount of the settlement equals the total after-tax profits made by U.S.C. during 1975, 1976 and 1977, plus one-half of the profits for 1974. It is submitted that the effect of this settlement on U.S.C. is harsher than upon any other settling Defendant. So harsh, in fact, that U.S.C. has been required to close one of its larger corrugating plants (putting some 200 people out of work) because of lack of working capital after making the settlement payments. U.S.C. has paid all it can and still remain in business.

II. *Reasons Why U.S.C. Entered Into Settlement Agreement.*

U.S.C. vehemently denies and will continue to deny that it has ever engaged in any type of conspiracy or other conduct which violates the antitrust laws. It has always refused to belong to the Fibre Box Association, wishing to remain fiercely independent of its competitors. Moreover, its sales can have little or no effect upon total industry sales as they account for only .005 of the total industry. Never before has U.S.C. been charged with any antitrust violations.

U.S.C. is not an integrated company. It must purchase its basic product—paper—from others who are also manufacturers of corrugated boxes. It, therefore, must have contacts with some of its competitors in order to buy paper. It is submitted that Plaintiffs have misconstrued these contacts as evidence of price-fixing of corrugated boxes. Also, Plaintiffs emphasize the fact in settlement negotiations that two former employees of U.S.C., both of whom have been dismissed with cause, were designated as witnesses for the government in the criminal trial. However, neither of these persons has yet been called as witnesses in the criminal trial. U.S.C. is a family-owned business controlled by two stockholders. Even though Plaintiffs demanded more of U.S.C. than other Defendants which U.S.C. felt were similarly situated, the decision was made to pay the above amount rather than to incur the enormous expenses in defending this litigation, as well as to prevent the disruption of its personnel by record searches, deposition giving, court appearances, and the like. The company simply does not have sufficient personnel to run the company and litigate a case of this magnitude at the same time. It was more economical to purchase its peace rather than fight.

III. *Effect of Westvaco Action for Contribution.*

If the Court allows Westvaco to file a suit for contribution, again embroiling U.S.C. in the very action in which it has spent $3,069,120.00 to settle, its effort to purchase its peace has been thwarted. U.S.C. has agreed with Plaintiffs to support this setlement before the Court. We do so. However, should the Court allow Westvaco to file its action for contribution U.S.C. should be given the opportunity to reevaluate its decision to settle, because it would

not have purchased its peace, as was its intention in paying and agreeing to pay the $3,069,120.00 to the Plaintiffs.

Respectfully submitted,

DAVID BLAND
Attorney for U.S. Corrugated
Fibre-Box Company

Of Counsel:

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1200 Smith Street
Houston, Texas 77002
(713) 651-9200

APPENDIX G

To the U. S. Senate Judiciary Committee—Subcommittee on the Constitution

Senators:

My name is George Kress of Green Bay, Wisconsin. Fifty-three years ago, at the age of 23, I started a company which is today known as Green Bay Packaging Inc. Our company manufactures corrugated boxes and from its beginning has been a family-owned and managed business. This business represents my family's entire assets—in other words—"all our eggs are in this one basket". I am appearing here today to explain to you how antitrust class actions threatened the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging Inc. (Green Bay) has annual sales of 125 million dollars in an industry with total sales of 10 billion dollars annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6% of the total industry sales and Green Bay having 1.5% of these sales. While other much larger corporations in this industry have diversified into other related activities (accounting for their much greater net worth), Green Bay has grown almost entirely in this single business area and currently has a total net worth of approximately 70 million dollars. Green Bay employs 1780 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi and Oklahoma.

Two years ago, Green Bay and 38 others in the same industry received a request from a Federal Grand Jury investigating antitrust price fixing conspiracy allegations.

Our company responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no real concern, for Green Bay has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the other corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws. (8 corporate felony indictments, 5 corporate misdemeanor indictments, 17 individual indictments, 9 individual felony indictments) Green Bay was not indicted, and none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial. This was fully within our expectations for we knew Green Bay was not guilty of any antitrust violations.

Less than one year following the Justice Department investigation, our company was named as a co-defendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department. Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in the civil actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the

civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend by the indicted defendants was then followed by many of the unindicted defendants entering into settlement agreements with the plaintiffs in the class actions. At this time, Green Bay conducted a detailed analysis of the situation and found as follows:

1. Approximately 80% of the defendants had entered into settlement agreements with the class plaintiffs;
2. The amount contributed by the settling plaintiffs at that time totaled over 100 million dollars.
3. Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base, the percentage share of the market, times a required dollar figure. Green Bay found that the dollar figure which had been offered to the first settling defendant, $500,000 per percentage point, had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was $3,700,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment—it would go up later and it was offered "take it or leave it."
4. Settlements in civil class action suits are encouraged by the Courts.

Green Bay now realized that it faced a monumental decision . . . pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

An estimate of the potential damages which might be decided by a Court was then necessary in order that a proper assessment of the situation was possible. Using a variety of assumptions, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, a damage figure of 5% of the total industry annual sales was selected—subtracting settlements already made, and multiplying the results by 3 (because the law provided for treble damages in such cases), we concluded that we must stand ready to bear the burden of a potential legal liability of 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability. This, of course, would wipe out our entire equity and give our legitimate creditors from 1½¢ to 10¢ on their debt dollar. The attached statements are offered to illustrate the alternatives we faced. The choices available to Green Bay management became clear—and the extortion aspect of civil class action suits was indeed now understood. Our company was faced with the following choices:

1. Settle the pending class action suits by paying more than 5.5 million dollars to the plaintiffs' lawyers (and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class), *or*

2. Stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over 5 billion dollars. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe liability. Our company's borrowing power was voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green

Bay reluctantly concluded a settlement agreement with the plaintiffs in the class actions. Loss of borrowing power is a killing factor for a small privately-owned corporation involved in a capital intensive manufacturing industry where a small busines must borrow in order to compete. Attorneys who are instituting class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, thus their settlement policy, once a few parties are coerced into early settlement is to "up the ante" unless the remaining parties settle reasonably soon. It has been said that settlements ignore the due process aspect of our system of justice—this would certainly seem to illustrate that point. (See the attached articles.)

The above cited situation has been repeated many times in the settlement process of the civil class action suits now pending in the corrugated container industry. The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exhorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Supreme Court, U. S.
FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI FILED DECEMBER 21, 1979
CERTIORARI GRANTED JUNE 16, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12-21-77	2	(JVS) PRACTICE and PROCEDURE ORDER, w/copy Pretrial Order No. 2 and Schedule A, filed. cc: Liaison for Pltfs. and Defts., and MDL Panel.
3-20-78	28	UNIFIED and CONSOLIDATED COMPLAINT, CLASS ACTIONS for Violations of Antitrust Laws, w/JURY DEMAND, filed. (Amends actions listed in Exhibit I, attached)
12- 4-78	235	MEMORANDUM of Pltfs. in Support of Motion for Tentative Approval of Proposed Partial Settlements with Defts. International Paper Co. and St. Regis Paper Co., filed. (All actions except CA H-78-671)
12- 4-78	237	AFFIDAVIT on Behalf of Defts. St. Regis Paper Co., in Support of Settlement Agreement, filed. (All actions except CA H-77-2158 78-04, 78-376, 78-671, 78-1226, 78-1263, 78-1815 and 78-2004)
12-11-78	244	MOTION of Deft. Westvaco Corp. for Leave to File Amended Answer and Cross-Claim, w/MEMORANDUM in Support Thereof, filed. (All actions except those identified on Exhibit II annexed to Unified and Consolidated Complaint, and CA H-78-671, H-78-1226 and H-78-1263) (cc JVS)
12-12-78	258	SUPPLEMENTAL MEMORANDUM of Certain Defts. (listed on attached page) in Support of Their Motion for Protective Order Prohibiting Disclosure of Privileged Documents or Information, filed.

DATE	NR.	PROCEEDINGS
12-14-78		(JVS) SETTLEMENT CONFERENCE Re: Proposed Settlements of St. Regis Paper Co., and International Paper Co. Appearances noted on attached Appearance List. Conference to be set during May, 1979 re: preliminary approval of settlement.
12-28-78	286	AGREEMENT of SETTLEMENT Between Boise Cascade Corporation and All Class Action Pltfs., filed. (All actions except H-77-2158, 78-04, 78-376, 78-671, 78-1226, 78-1263, 78-1815 and 78-2004.)
3- 1-79	509	MOTION of Deft. Westvaco Corp., for Leave to File Amended and Supplemental Answer and Cross-Claim, filed. (cc JVS) (All actions except those identified on Exhibit II Annexed to Unified and Consolidated Complaint, and CA H-78-671, 78-1226 and 78-1263.)
4-16-79	531	MOTION of Class Pltfs. for Preliminary Approval of Settlements, w/MEMORANDUM in Support Thereof, *FILED UNDER SEAL.*
5- 9-79	634	MOTION of Deft. Packaging Corporation of America for Leave to File Amended and Supplemental Answer and Cross-Claim, filed. (cc JVS) (Relates to all actions except those identified on Exhibit II Annexed to the Unified and Consolidated Complaint, and CA. H-78-671, H-78-1226 and H-78-1263)
5-10-79	636	MOTION of Deft. Georgia-Pacific Corporation for Leave to File Amended Answers and Cross-Claims, filed. (cc JVS) (Relates to all class actions in which Georgia-Pacific Corp., has been named as a Deft.)

DATE	NR.	PROCEEDINGS
5-11-79	645	OBJECTIONS of Certain Active and Reserve Class Representatives to Preliminary Approval of Proposed Settlements, filed. (By Granvil I. Specks and James B. Sloan on behalf of Active and Reserve Class Representatives listed thereon.)
5-21-79	672	MOTION of Deft. Packaging Corp. of America for Leave to File Amended Answer and Cross-Claim, filed. (cc JVS)
5-30-79	694	(JVS) PRETRIAL ORDER No. 13, filed. P/n. a.s. 1. MOTIONS of various non-settling defendants for leave to file cross-claims for contribution against settling defendants-DENIED. (Reasons for this decision set forth in following Memorandum Opinion filed 5-30-79.) All cross-claims for contribution which have been filed are dismissed w/prej.; this decision is entered as a final judgment. 2. MOTIONS of various non-settling defendants for leave to file amended or supplemental answers-DENIED. 3. MOTION of Deft. Mead Corporation to decertify the "class and sub-class" as to non-settling defendants-DENIED. 4. MOTION of Deft. Container Corporation to decertify the sheet plant sub-class and to exclude sheet plants from further class status-DENIED. 5. MOTION of Deft. St. Joe Paper Co. that sheet plant sub-class be merged with container purchaser sub-class-DENIED at this time.

DATE	NR.	PROCEEDINGS
	6.	As to Pltfs. MOTION for rehearing w/respect to Paragraph 11 of Pretrial Order No. 11, it is ordered that Pretrial Order No. 11, paragraph 11, be modified to read: "Plaintiffs' joint objection to defendants' request for documents number 15, requesting financial data on plaintiff companies not publicly held, is SUSTAINED.
	7.	MOTION of Pltfs. for order concerning videotape and telephone depositions-GRANTED as modified herein (see this order for details).
	8.	As to Pltfs. MOTION re: disclosure of materials in government document depository, the following briefing schedule shall apply: Defts. and United States to respond by 5-24-79; Pltfs. to reply by 5-31-79, and individual witnesses to file responses they wish Court to consider by 6-1-79. HEARING on this question set for 6-4-79 at 10:00 a.m.
	9.	MOTION of Pltfs. for preliminary approval of class settlements with following defendants GRANTED: See this order for named Defts. (FINDINGS of FACT re: Settlements follows, filed 5-30-79)
	10.	NOTICE of Depositions of Messrs. Susman, Montague, Hoyt, Robertson and Harrison, filed 5-2-79, and subpoenas relating thereto are hereby quashed.

DATE	NR.	PROCEEDINGS
5-30-79	695	(JVS) MEMORANDUM OPINION, filed, DENYING MOTIONS of Defts. Westvaco, Packaging Corporation of America, Georgia-Pacific and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class-DENIED. P/n. a.s.
5-30-79	696	(JVS) FINDINGS of FACT and CONCLUSIONS of LAW Concerning PROPOSED SETTLEMENT AGREEMENTS, filed. P/n. a.s.
6- 8-79	714	NOTICE OF APPEAL of Deft. WESTVACO CORP. to Pretrial Order No. 13 entered 5-30-79, filed.
6-11-79	717	NOTICE OF APPEAL of Deft. GEORGIA-PACIFIC CORP. to Pretrial Order No. 13 entered 5-30-79, filed.
6-15-79	725	NOTICE OF APPEAL of Deft. PACKAGING CORP. of AMERICA to Pretrial Order No. 13, entered 5-30-79, filed.
6-25-79	736	NOTICE OF APPEAL of Deft. WESTVACO CORP. to Pretrial Order No. 13, paragraph 2 entered 5-30-79, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

MDL No. 310

(All Cases)

PRACTICE AND PROCEDURE ORDER

Filed December 21, 1977

1. Pending further orders of this court, this order shall govern the practice and procedure in those actions transferred to this court by the Judicial Panel on Multidistrict Litigation pursuant to its order of November 29, 1977, as well as all related actions originally filed in this court or transferred or removed to this court. These actions are listed in Schedule A attached hereto. This order shall also govern the practice and procedure in any tagalong cases transferred to this court by the Judicial Panel on Multidistrict Litigation pursuant to Rule 9 of the Rules of Procedure of that panel subsequent to the filing of the final transfer order by the clerk of this court and any related actions subsequently filed in this court or transferred or removed to this court.

2. The actions described in paragraph 1 of this order are hereby consolidated for pretrial purposes.

3. A signed original of any pleading or paper shall be filed; no additional copies are necessary. All papers filed in these actions shall bear the style and * * *

* * * *

8. All discovery proceedings in these actions and the time for filing responsive pleadings in this case are stayed until further order of this court. The time requirements to perform any acts or file any papers pursuant to Rule 12 and Rules 26 through 37 of the Federal Rules of Civil Procedure are tolled until the first pretrial conference, at which time a discovery schedule will be established.

9. Any orders, including protective orders previously entered by this court or any transferor court, shall remain in full force and effect unless modified by this court upon application.

10. Attached is a copy of an order already entered by this court relating to the organization of plaintiffs' counsel and related matters. Mr. Robert J. Malinak of the law firm of Baker & Botts, is designated as interim liaison counsel for the defendants. As indicated, attached is Pretrial Order No. 2 concerning the organization of plaintiffs' counsel which has been approved by this court. By date of the first pretrial conference, the defendants are requested to organize themselves along the same lines and to adopt the same or reasonably similar organizational order. If such has not been done by agreement, this court contemplates ordering defendants' counsel to accomplish this result.

11. All scheduling of conferences or appearances before the court shall be made through Ms. Angie Sierra, Deputy Clerk, at (713) 226-4261.

12. The court will be guided by the Manual for Complex and Multidistrict Litigation, approved by the Judicial Conference of the United States. All counsel are directed to familiarize themselves with that publication.

13. Liaison counsel for plaintiffs, William E. Wright, is preparing a codification of local rules relating to the United States District Court for the Southern District

of Texas, and a copy of such local rules can be obtained from Mr. Wright.

14. The court is acutely aware of the magnitude of this litigation and of the potential expense to the litigants and the burdens that the litigation will impose upon all the parties and the attorneys. To that end the court expects and will, if necessary, require all attorneys and clients to cooperate to the fullest extent to lessen the potential expense and the burden of time. For example, the court would expect that counsel on all sides attempt in every way to keep to a minimum the number of motions proposed to be filed and, where possible, file only one motion, pleading, or brief pertaining to the same subject matters. Although this court does not have a general order to this effect and does not contemplate entering one, except if it becomes necessary, the number of interrogatories that are submitted to each party or to each potential witness should be limited to absolutely necessary questions. The court is mindful of the fact that in some United States District Courts, the number of interrogatories is limited to twenty questions that can be submitted to any one party or any one witness. Also, the court expects complete cooperation regarding the scheduling of depositions and this likewise should be limited to only those depositions that are absolutely necessary for either discovery or for the perpetuation of testimony.

15. The court also expects counsel to develop a procedure for expediting service of process or waivers thereof, where such has not been heretofore effected, so as to lessen the burden of unnecessary paper work by the clerk and the Marshal's office.

16. During the pendency of this litigation, each of the parties herein and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual

notice of this Order by personal service or otherwise, are restrained and enjoined from destroying or causing the destruction of, or permitting the destruction of, any arguably relevant documents or other arguably relevant items now existing, except upon prior approval of the court obtained by application showing cause therefor, with notice to all other parties of such application, providing them an opportunity to be * * *

* * * * *

(b) The establishment of a schedule for early determination of the class action questions, including a schedule for prompt completion of discovery relative to the class action issue and the entry of appropriate orders to prevent potential abuse. The court does not contemplate staying discovery on the class action features of these cases pending the outcome of any grand jury investigation or the return of any indictments. At the initial pretrial conference, the court will permit reasonable oral arguments on this question.

(c) Procedure for expediting service as mentioned in paragraph 15.

DONE at Houston, Texas, on the 21st day of December, 1977.

/s/ *John V. Singleton, Jr.*
United States District Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

Master File No.

Honorable John V. Singleton

C.A. No. 77-H-461

ADAMS EXTRACT CO., *et al.*,
Plaintiffs,

vs.

ALTON BOX BOARD COMPANY, *et al.*,
Defendants.

PRETRIAL ORDER NO. 2

1. *Organization of Plaintiffs' Counsel.* The Organizational structure established by this order shall include all counsel in all actions, whether brought as class actions or as individual actions, except as otherwise indicated.

2. *Committee of Plaintiffs' Counsel.* The Committee of Plaintiffs' Counsel, consisting of all plaintiffs' attorneys in these actions, shall have ultimate authority for conducting the pretrial activities of the plaintiffs. In litigation of this magnitude and complexity, it is imperative that attorneys cooperate with each other to the fullest extent possible so that pretrial procedures may move forward with dispatch and a minimum of friction.

3. *Steering Committee.* The Steering Committee of the Committee of Counsel shall provide general supervision and direction to the activities of plaintiffs' counsel. It is expected to maintain communication and promote harmonious dealings among all plaintiffs' counsel.

The Steering Committee shall execute the orders of the Court concerning the conduct of the litigation; receive, formulate, and draft material for the plaintiffs, including material such as interrogatories, pleadings, motion papers, and the like; initiate and supervise discovery efforts of the plaintiffs; and initiate proceedings in Court, proceedings outside of Court, and all negotiations with defendants.

The Steering Committee shall act as spokesman for plaintiffs' counsel in matters of joint or common action. This does not derogate from the right of other counsel to be heard on matters not susceptible of joint or common action or when *genuine* and *substantial* disagreement exists among counsel. The Court disfavors the presentation of cumulative views or views that differ from the Steering Committee's in only minor and petty ways.

The Chairman of the Steering Committee shall preside over meetings of the committee and supervise the overall activity of the committee. He shall appoint the members of all other committees and subcommittees, subject to the disapproval of the majority of the Steering Committee, and shall perform whatever other functions may be assigned to him by the Court and the Steering Committee. The Chairman, together with the Vice Chairman, may act for the committee whenever it is impracticable to obtain a decision of the committee.

To carry out the duties and responsibilities set forth above, the Court appoints the following counsel to serve on the Steering Committee in the positions indicated unless and until replaced by the Court:

Stephen D. Susman
Mandell & Wright
Houston, Texas
Chairman

Vance K. Opperman
Doherty, Rumble & Butler
St. Paul, Minnesota
Vice Chairman

Allen D. Black
Fine, Kaplan & Black
Philadelphia, Pennsylvania * * *

* * * *

shall report it to all counsel with an indication of each party's pro rata share of the total. The Steering Committee will maintain an account to which the parties will contribute and from which the Liaison Counsel will be paid.

_____ _____

Date United States District Judge

Approved as to form and substance by:

/s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
on behalf of all Plaintiffs

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
HERETO AS NOT INCLUDED

UNIFIED AND CONSOLIDATED COMPLAINT CLASS ACTIONS FOR VIOLATIONS OF ANTITRUST LAWS JURY TRIAL DEMANDED

Filed March 20, 1978

UNIFIED AND CONSOLIDATED COMPLAINT

1. This Unified and Consolidated Complaint ("this Complaint") is filed pursuant to the Order of the above-entitled Court ("the Court") filed on March 2, 1978. This Complaint amends each of the complaints in the actions filed by the plaintiffs identified in Exhibit I hereto.

JURISDICTION

2. This litigation arises under Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. The Court has jurisdiction of this litigation under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, and under 28 U.S.C. § 1337.

VENUE

4. Each defendant maintains an office or plant, transacts business, is found, or has an agent within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The claims alleged herein against each defendant arose in the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The interstate trade and commerce involved and affected by the violations alleged herein were, at all times material hereto, and are now, carried on, in part, within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts.

5. The Southern District of Texas is the proper forum for the conduct of pre-trial proceedings in this litigation pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977. *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.D.L. 1977).

PARTIES

6. The names of the plaintiffs are set forth in Exhibit I hereto, which is incorporated herein by this reference.

7. Each of the plaintiffs purchased corrugated containers or corrugated sheets, or both corrugated containers and corrugated sheets, from one or more of the defendants, or subsidiaries or affiliates of the defendants, during the period of time covered by this Complaint.

8. Each of the corporations named in this paragraph 8 is made a defendant herein. The corporate defendants and their respective states of incorporation and principal places of business are listed below. During all or part of the period of time covered by this Complaint, each of the corporate defendants engaged in the business of manufacturing and selling corrugated containers or corrugated sheets, or both, in the United States.

Name of Corporate Defendant	State of Incorporation	Principal Place of Business
Alton Box Board Company	Delaware	Alton, Illinois
Boise Cascade Corporation	Delaware	Boise, Idaho
Champion International, Inc.	New York	Stamford, Connecticut
The Chesapeake Corporation of Virginia	Virginia	West Point, Va.
Consolidated Packaging Corporation	Michigan	Chicago, Illinois
Container Corporation of America	Delaware	Chicago, Illinois
The Continental Group, Inc.	New York	New York, N.Y.
Corco, Inc.	Ohio	Worthington, Ohio
Crown-Zellerbach Corporation	Nevada	San Francisco, Cal.
Diamond International Corporation	Delaware	New York, N.Y.
Dura-Containers, Inc.	Delaware	Indianapolis, Ind.
Fibreboard Corporation	Delaware	San Francisco, Cal.
Georgia-Pacific Corporation	Georgia	Portland, Oregon
Green Bay Packaging, Inc.	Wisconsin	Green Bay, Wis.
Hoerner Waldorf Corporation	Delaware	St. Paul, Minn.
Inland Container Corporation	Indiana	Indianapolis, Ind.

Name of Corporate Defendant	State of Incorporation	Principal Place of Business
International Paper Company	New York	New York, N.Y.
Interstate Container Corporation	New York	New York, N.Y.
Longview Fibre Company	Delaware	Longview, West Va.
MacMillan Bloedel, Inc.	Alabama	Stamford, Conn.
MacMillan Bloedel Containers, Inc	Delaware	Chicago, Illinois
The Mead Corporation	Ohio	Dayton, Ohio
Menasha Corporation	Wisconsin	Neenah, Wisconsin
Olinkraft, Inc.	Delaware	West Monroe, La.
Owens-Illinois, Inc.	Ohio	Toledo, Ohio
Packaging Corporation of America	Delaware	Evanston, Ill.
Potlatch Corporation	Delaware	San Francisco, Cal.
St. Joe Paper Company	Florida	Jacksonville, Fla.
St. Regis Paper Company	New York	New York, N.Y.
Southwest Forest Industries, Inc.	Nevada	Phoenix, Arizona
Stone Container Corporation	Illinois	Chicago, Illinois
Union Camp Corporation	Virginia	Wayne, New Jersey
U.S. Corrugated Fibrebox Co.	Indiana	Indianapolis, Ind.
Western Kraft East, Inc.	Oregon	Bellmawr, New Jersey
Westvaco Corporation	Delaware	New York, N.Y.
Weyerhaeuser	Washington	Tacoma, Washington
Willamette Industries	Oregon	Portland, Oregon

9. Within the period of time covered by this Complaint, defendant The Continental Group, Inc. was also known as "Continental Can Company, Inc."

10. Defendant Hoerner Waldorf Corporation has merged into defendant Champion International, Inc.; and

defendant Champion International, Inc. has thereby assumed, among other things, all of the liabilities of defendant Hoerner Waldorf Corporation to plaintiffs and the class arising out of the violations alleged herein.

11. The Fibre Box Association, an unincorporated association, with its principal offices located in Chicago, Illinois, is also made a defendant herein. During all or part of the period covered by this Complaint, said defendant held meetings of various committees and maintained a statistical reporting system which was used or usable by defendants in furtherance of the combination and conspiracy alleged herein.

CO-CONSPIRATORS

12. Various corporations and individuals not made defendants in this Complaint participated as co-conspirators with the defendants in the violation alleged herein, and performed acts and made statements in furtherance thereof.

CLASS ACTION ALLEGATIONS

13. Plaintiffs, by their attorneys, bring these actions for injunctive relief and for treble damages due to defendants' violations of the antitrust laws as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978. As used

herein, the term "independent corrugated box manufacturers" means and refers to all persons who owned or controlled one or more plants which manufactured containerboard from Kraft liner board and corrugated continers from such containerboard, but who did not manufacture Kraft liner board.

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the class.

(c) The claims of the plaintiffs are typical of the claims of the class.

(d) The plaintiffs will fairly and adequately protect the interests of the class.

(e) The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

(f) Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

The members of the class, including plaintiffs, purchased or paid for corrugated containers or corrugated sheets during the class period and sustained damages as a result of the combination and conspiracy alleged herein.

TRADE AND COMMERCE

14. Corrugated containers are made from that category of paperboard referred to as containerboard. Containerboard and corrugated sheets consist of an inner fluted sheet, the corrugating medium, glued between two liners of flat facings. In the manufacture of corrugated containers, containerboard is printed, scored, creased and die-cut. Joints are fastened by stitching with wire, by taping with gummed tape, or by gluing. Generally, corrugated containers are shipped to the customer in a knocked-down state and are then set up by the user. Corrugated containers are manufactured in a large number of sizes and shapes and are tested for degree of strengths, weights, and resistance to liquid and temperature.

15. Corrugated containers are used as shipping containers by a wide variety of industries because they are strong, lightweight, and relatively inexpensive. Corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Buyers of corrugated containers include, among others, processors of food and beverage products and manufacturers of paper and printed materials, glass and ceramic products, metals and machinery, chemicals, paints, drugs, soaps and cosmetics, appliances and electrical equipment, clothing textiles and leather, rubber and plastic, furniture and wood, and transportation equipment.

16. During all or part of the period of time covered by this Complaint, corrugated containers and corrugated sheets were sold by the defendant corporations in the United States.

17. During the period of time covered by this Complaint:

(a) The defendant corporations and co-conspirators sold substantial quantities of corrugated containers and corrugated sheets in the United States, which were shipped in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which such corrugated containers and corrugated sheets were manufactured;

(b) Substantial quantities of the materials used by the defendant corporations and co-conspirators in the manufacture of corrugated containers and corrugated sheets regularly moved in interstate commerce from their source to states where corrugated container and corrugated sheet manufacturing facilities are located; and

(c) The sale and shipment of corrugated containers and corrugated sheets to customers in interstate commerce and the purchase and shipment in interstate commerce of materials used in the manufacture of corrugated containers and corrugated sheets were substantially affected by the combination and conspiracy alleged in this Complaint.

VIOLATION ALLEGED

18. Beginning sometime prior to 1960, the exact date being unknown to the plaintiffs, and continuing thereafter until January 25, 1978, there has been a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise

maintain, and stabilize the prices of corrugated containers and corrugated sheets.

20. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) Disclosed to other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(b) Received from other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(c) Submitted non-competitive bids or quotations or no bids or quotations to buyers of corrugated containers and corrugated sheets;

(d) Agreed with other members of the conspiracy upon increases in prices of corrugated containers and corrugated sheets; and

(e) Took steps to enforce compliance with the aforesaid combination and conspiracy.

EFFECTS

21. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Purchasers of corrugated containers and corrugated sheets have been deprived of free and open competition in the purchase of corrugated containers and corrugated sheets; and

(b) Competition in the sale of corrugated containers and corrugated sheets among the defendants and co-conspirators has been restrained and prices of corrugated containers and corrugated sheets have been raised to, and fixed, maintained, and stabilized at artifical and non-competitive levels.

FRAUDULENT CONCEALMENT

22. Until on or after March 21, 1977, plaintiffs and the members of the class had no knowledge of any of the violations of the antitrust laws alleged herein, or of any facts which might have led to the discovery thereof. Plaintiffs and the members of the class could not have uncovered any of the violations at any time prior to March 21, 1977, by the exercise of due diligence inasmuch as the unlawful conspiracy was fraudulently concealed by the defendants, who resorted to secrecy to avoid detection of the conspiracy.

INJURY TO PLAINTIFFS

23. During and throughout the period of the aforesaid combination and conspiracy, plaintiffs and the members of the class purchased substantial quantities of corrugated containers and corrugated sheets from one or more of the defendants. By reason of the aforesaid combination and conspiracy, those purchases were made at prices higher than the prices which plaintiffs and the members of the class would have paid in the absence of any such combination or conspiracy.

24. As a result of the aforesaid combination and conspiracy, plaintiffs and the class have sustained substantial losses and damages to their business and property in an amount which is presently undetermined.

PRAYER FOR RELIEF

25. WHEREFORE, plaintiffs pray for judgment against defendants, jointly and severally, and in favor of plaintiffs and the class, as follows:

(a) That the aforesaid combination and conspiracy and the acts done in furtherance thereof by defendants be adjudged to have been in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

(b) That plaintiffs and the other members of the class recover threefold the damages determined to have been sustained by each of them respectively as a result of the conduct of the defendants complained of herein, and that joint and several judgment be entered against defendants, and each of them, for the amount so determined.

(c) That defendants and all other persons acting on their behalf or in concert with them be perpetually enjoined and restrained from conducting, maintaining, renewing, or carrying on the aforesaid combination and conspiracy or any other combination or conspiracy having a similar purpose or effect in restraining competition in the sale of corrugated containers or corrugated sheets.

(d) That plaintiffs recover from the defendants the cost of this suit and reasonable attorneys' fees in accordance with the federal antitrust laws.

(e) That plaintiffs and the class have such other and further relief as the Court may deem just and proper.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002
(713) 228-1521

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman
Vice Chairman, Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101
(612) 291-9333

BY /s/: *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee
and all Plaintiffs Indentified In Exhibit I Hereto as Included

JURY DEMANDED

Plaintiffs demand trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002
(713) 228-1521

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman
Vice Chairman, Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul,Minnesota 55101
(612) 291-9333

BY /s/: *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee
and all Plaintiffs Indentified In Exhibit I Hereto as Included

[Certificate of Service omitted]

EXHIBIT I

PLAINTIFFS AND CIVIL ACTIONS INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

Plaintiffs	Civil Action Docket Numbers	Comments
1. Adams Extract Co.	77-H-461	
2. After Six, Incorporated Bert Paley, Ltd.	H-77-805	Plaintiff Commonwealth Toy & Novelty Co., Inc. to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
3. The Amberley Greeting Card Company The Al Barker Publishing Co. Mr. B. Greeting Card Co., Inc.	H-78-56	
4. Andre-Boudin Bakeries, Inc.	H-78-53	
5. Arcadia Furniture Corporation	H-77-790	
6. Artcraft Press, Inc.	H-77-2147	
7. Austin Products Co.	H-77-782	
8. Bodines, Inc.	H-78-64	
9. The Beaumont Company	H-78-11	
10. Carron Manufacturing Company	H-78-60	
11. Co-ordinated Industries, Inc.	H-78-58	
12. Covington Fabrics Corp.	H-78-10	
13. Denver Meat Company	H-77-1934	
14. Doranne of California, Inc., d/b/a Embassy Giftwares	77-H-724	
15. Douglas Furniture Corp.	H-78-54	

Plaintiffs	Civil Action Docket Numbers	Comments
16. Durawood Industries, Inc.	H-78-62	
17. Erie Seating Co. Rossville Packing Co.	H-78-68	
18. Furniture Plastics, Inc.	H-78-59	
19. Grist Mill Co.	H-77-849	
20. Haeger Potteries, Inc. Macomb Pottery Co., Inc.	H-77-1457	
21. Land O'Lakes, Inc.	H-78-170	
22. Levee Furniture Company	H-77-793	
23. Northland Aluminum Products, Inc.	H-78-171	
24. Marathon Enterprises, Inc. District Hotel Supply, Inc. Jefferson Orchards, Inc.	H-77-584	Plaintiff Pepsi-Cola Bottling Co. of Washington, D.C. Inc., to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
25. Red Wing Industries, Inc.	H-77-804	
26. Salsburg Meats, Inc.	H-78-67	
27. Sambo's Restaurants, Inc.	H-78-63	
28. Scranton Royal Crown Bottling Co. Carl and Wallace Eisenstat, t/a Scranton Pepsi-Cola Bottling Co. I. Kaplan, Inc. Mid-Valley Packing Co., Inc. Golden Quality Ice Cream Co. Atlas Container Co., Inc.	78-375	Presently pending in E.D., but expected to be transferred to this Court as a tag-along action, pursuant to Rule 9 of Jud. P. on Mult. D. Lit.

Plaintiffs	Civil Action Docket Numbers	Comments
29. Shell-Tex Fisheries, Ltd.	H-77-876	
30. Snyder-Craft Co., Inc.	H-78-65	
31. Tierra Royal Potteries, Inc. Continental Nut Co.	H-77-2168	Plaintiff Continental Nut Co. is hereby added pursuant to Federal Rules of Civil Procedure 15 and 21.
32. Town House Furniture Ltd. Penthouse Furniture Ltd.	H-78-69	
33. Universal Cooperatives, Inc.	H-77-885	
34. Valley Avacodo Sales, Inc.	H-77-869	
35. Valley Plastics, Inc.	H-77-792	
36. West Publishing Company	H-77-791	
37. Westside Paper Company	H-78-48	
38. Williams Manufacturing Company Seneca Industries, Inc.	H-77-789	
39. Winona Industries, Inc.	H-77-814	
40. Wittek Golf Supply Co., Inc.	H-78-55	

EXHIBIT II

PLAINTIFFS AND CIVIL ACTIONS NOT INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

A. The Following Class Actions Are to be Dismissed Voluntarily Pursuant to Federal Rule of Civil Procedure 41(a):

Plaintiffs	Houston Civil Action Docket Numbers
1. Carnivale Bag Co., Inc.	H-78-61
2. Pepco Industries, Inc.	H-77-813
3. Steve Matson Products, Inc.	H-77-1991
4. Veneer Distributors, Inc.	H-78-66
5. Westbrae Natural Foods, Inc.	H-78-57

B. Non-Class-Actions Not Included:

Plaintiffs	Houston Civil Action Docket Numbers
1. ITT Continental Baking Company Pearson Candy Company The Paniplus Company ITT Gwaltney, Inc.	H-78-36
2. United Farmers Cooperative, Inc. Bookout & Mitchell Supply, Inc. Valley Farms, Inc. Griffin & Brand Sales Agency, Inc. Gateway Farms, Inc. International Frozen Foods, Inc.	H-77-2158
3. United Foods, Inc. John Inglis Frozen Foods Company Winter Garden, Inc. Dulany Foods, Inc. Nutritional Food Products, Inc. United Food Services, Inc. Trappe Frozen Foods Corporation	H-78-4

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TENTATIVE APPROVAL OF PROPOSED PARTIAL SETTLEMENTS WITH DEFENDANTS INTERNATIONAL PAPER COMPANY AND ST. REGIS PAPER COMPANY

Filed December 4, 1978

Plaintiffs have entered into settlement agreements with defendants St. Regis Paper Company ("St. Regis") and International Paper Company ("International Paper"). Those agreements, which are memorialized in Exhibits A and B attached hereto, provide for a combined settlement principal of $10 million plus interest. Pursuant to Rule 23, plaintiffs have moved for tentative approval of these settlements, and plaintiffs submit this Memorandum in support of that motion.

I.

Summary of Settlement Terms

Pursuant to the St. Regis agreement, executed on July 21, 1978, that defendant has paid $1.7 million into

an escrow account, which is drawing interest at the rate of 8.6 percent per annum. Pursuant to the International Paper agreement, executed on August 25, 1978, International Paper has paid $8.3 million into an escrow account, which is now accruing interest at a rate in excess of 8.6 percent per annum. In addition, both agreements provide the following basic terms:

(1) Interest earned on the principal settlement sums will become and remain a part of the settlement fund, which may be used to defray expenses of this litigation.

(2) Each defendant consented to a settlement class as follows:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978.

(3) Each defendant agreed to identify all class members who purchased corrugated containers and sheets from them to the extent such information is available.

(4) Each agreement provides that it shall not be construed to affect, in any manner, any joint or several liability of any non-settling defendant (*i.e.*, the settlements will not reduce the amounts otherwise recoverable from the non-settling defendants).

(5) The passage by Congress, subsequent to December 31, 1978, of any legislation (hereinafter "Illinois Brick" legislation) conferring standing on indirect purchases and allowing defendants to assert the pass-on defense as

to direct purchases (here the settling class), will not allow the settling defendants to rescind the settlement.

The International Paper Agreement obligates that defendant to cooperate fully with the designee of plaintiffs' Steering Committee in connection with these proceedings, including but not limited to specific items relating to documents, copies of grand jury transcripts, interviews and summaries of interviews with government attorneys, and depositions of officers, employees and agents, as more particularly set forth in Paragraph 15 of that agreement. Although the St. Regis agreement does not expressly set forth a similar provision, counsel for St. Regis agreed that his client would not oppose plaintiffs' request for access to transcripts of testimony of St. Regis employees, officers, or directors before the Federal Grand Jury in Houston and that he would furnish all documents provided to any government agency relating to the fungibility of corrugated containers.

II.

Standards Governing Preliminary Approval

At this stage, of course, plaintiffs seek only preliminary approval of these settlements. For these purposes, the Court need only be satisfied that the proposed settlements are "within the range of possible approval." See Manual for Complex Litigation, ¶ 1.46 (hereinafter "Manual"). The Manual further states:

> Such preliminary hearing is not, of course, a definitive proceeding on the fairness of the proposed settlement and the judge must be careful to make clear that the determination to permit the notice to be given to members of the class is not a finding that the settlement is fair and reasonable. On the contrary, he should make clear that it is simply a determination that there is in effect, "probable cause"

> to submit the proposal to members of the class and to hold a full scale hearing on its fairness at which all interested parties will have an opportunity to be heard after which a formal finding on its fairness will be made. *Id.*

This District Court has said that in assessing such settlements the Judge "shall examine the terms of the settlement and determine if the settlement appears reasonable on its face." *Magana* v. *Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).

Ultimately, of course, the Court must finally approve or disapprove the settlement. Recently, the Fifth Circuit reiterated the basis criteria for making that determination in the class action context:

> Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits. . . . In class actions this principal must be coupled with the two-fold requirement that (1) there is no fraud or collusion in arriving at the settlement and (2) the settlement is fair, adequate and reasonable. . . .

Miller v. *Republic National Life Insurance Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). The Fifth Circuit has also said: "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).*

The District Court has broad discretion in determining whether to approve a proposed class action settlement. In

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* The federal courts have long adopted a policy of encouraging and supporting the amicable resolution of litigation. *See, e.g., Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit articulated the rationale for this role.

> Great weight is accorded . . . [the trial judge's] views because he is exposed to the litigants and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly. *Id.* at 454.

In exercising that discretion, however, district courts need not, and indeed may not conduct a trial on the merits of the dispute, because "[t]he very purpose of compromise is to avoid the delay and expense of such a trial." *Young* v. *Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974). As the Fifth Circuit aptly observed:

> [A settlement] could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesistant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope for recovery and thus no basis for a compromise.

Florida Trailer Equipment Co. v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960).

Recognizing that settlement represents an exercise of judgment by the negotiating parties, the courts have uniformly held that the judge reviewing the settlement should not resolve issues intentionally left unresolved or substitute his judgment for that of the negotiating parties. Rather, the courts have given considerable weight to the views of experienced counsel as to the merits of the settlement. *See Hinton, supra; Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975); *State of*

W. Virginia v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D. N.Y. 1972). Indeed, according to the Fifth Circuit, absent fraud, collusion or the like, the trial judge should be hesitant to substitute his own judgment for that of counsel. *See Hinton, supra.*

III.

The Proposed Settlements Are Within The Range of Possible Approval

A. *The Instant Settlements Resulted From Good Faith, Arms' Length Negotiations.*

The Court should, of course, be satisfied that the settling parties have not entered into a "sweetheart settlement." *See Stull* v. *Baker*, 410 F. Supp. 1326 (S.D. N.Y. 1976), which emphasizes the importance of "zealously advocated, arms' length negotiations." When settlements are reached prior to class certification and thus prior to court appointment of class representatives, the court should be particularly mindful that the interests of the class were adequately represented. *See Ace Heating & Plumbing* v. *Crane Co.*, 453 F.2d 30 (1971).

Although the proposed settlements here were reached prior to class certification, that poses no problem whatsoever, since the negotiations were carried out with express approval of the Court and pursuant to procedures established in Pretrial Order No. 2, and in any event, counsel conducting the negotiations are now counsel for designated representatives of a class certified after an adversary hearing. Pretrial Order No. 2 established the Steering Committee, and authorized it to initiate and engage in all settlement negotiations with defendants.*

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* Pretrial Order No. 2 was entered on December 6, 1977, several months before settlement negotiations began.

Pursuant to that authority, the Steering Committee appointed an Ad Hoc Committee to conduct all settlement negotiations. In addition, before beginning negotiations with either St. Regis or International Paper, plaintiffs requested and received from the Court permission to institute settlement discussions. Moreover, plaintiffs' Steering Committee and all representatives for both container and sheet purchasers, approved the agreements.

Not only were the settlements effectuated in a manner sanctioned by the Court, the provisions thereof demonstrate the vigorous adversarial and arms' length nature of the negotiations. First, over strenuous objection by the settling defendants, plaintiffs insisted upon and received agreement that the settlements would not be contingent upon ultimate class certification. Thus, in effect, plaintiffs were able to guarantee members of the class a $10 million fund plus interest, regardless of the class determination outcome. Second, plaintiffs secured a provision, again despite resistance by International Paper and St. Regis, that their container and sheet sales would not be excluded from the sales upon which damages are calculated in this lawsuit. This means that the class will still be entitled to recover the entire overcharge from the remaining non-settling defendants. Also, though the settling defendants initially sought the right to opt out of the settlements in the event Congress passes Illinois Brick legislation prior to distribution of the settlement funds, plaintiffs, having reason to believe that this would not happen during the current session of Congress, insisted upon and obtained defendants' agreement that Illinois Brick legislation passed subsequent to December 31, 1978, would not provide defendants with a right to terminate the settlements. Finally, plaintiffs insisted on cooperation and discovery concessions that, in the case of International Paper, were accepted only with great reluctance and after several weeks of continuous negotiation.

Thus, the settling parties conducted negotiations according to guidelines and procedures established by the Court and with the Court's knowledge and permission. The Steering Committee and all plaintiffs' counsel approved the agreements prior to their execution. Finally, plaintiffs were able to secure key provisions of substantial benefit to the class that were strongly resisted by the defendants. Thus these settlements unquestionably resulted from good faith, arms' length negotiation.

B. *The Instant Settlements are Fair, Adequate and Reasonable.*

1. These Partial Settlements Will Not Reduce Any Ultimate Recovery On Behalf Of The Class.

In settling with St. Regis and International Paper, plaintiffs have obtained for the class payments of $10 million in principal that will accrue interest of over $800,000 per year until the settlement funds are disbursed. Not only does that monetary recovery represent a substantial benefit to the class, but importantly, it in no way limits any further recovery against the non-settling defendants, whether by way of settlement or jury verdict. The Manual points up the significance of that fact:

> The primary criteria for the court in evaluating the fairness and adequacy of a proposal is an informed estimate of the probabilities of both liability and damages. . . . Only by making such an estimate can a court decide whether the concrete present and future benefits held forth by the settlement without the expense and delay of trial and subsequent appellate procedures are worth *relinquishment* of plaintiff's claims. (emphasis added) (citing *Ace Heating & Plumbing Co.* v. *Crane Co., supra*).

Here, plaintiffs have not relinquished their claims at all. Both settlement agreements provide that the settling defendants' sales will not be excluded from the total sales upon which damages are to be calculated in this case. Thus plaintiffs are entirely free to recover the entire overcharge from any defendants who try this lawsuit. In effect, then, plaintiffs have gained $10 million plus interest and have given up nothing, as should be obvious from the number and combined net worth of the non-settling defendants.

A district court considered this very situation in *Wainwright* v. *Kraftco Corp.*, 50 F.R.D. 9 (N.D. Ga. 1973), and found the partial settlement to be fair, adequate, and reasonable. After noting that in a multi-defendant antitrust action, co-conspirators are jointly and severally liable for the entire amount of damages caused by their illegal acts, the court said:

> Keeping these principles in mind, the court concludes that the settlement does not work to the prejudice of the class. Since the remaining defendants named in this action will still be responsible for the entire amount of damages caused by Better Maid, if any, the class will sustain no economic loss by settling with Better Maid now. Indeed, if all the defendants but one settle with the class, the remaining defendants would still be liable for the damages caused by all. In sum, the settlement with Better Maid appears to the court as fair, adequate and reasonable as far as the plaintiff class is concerned. *Id.* at 11-12.

Thus, for this reason alone, the settlement should be preliminarily approved.

2. The Settlements Guaranteed The Class A Substantial Settlement Fund, Regardless Of The Outcome Of The Class Certification Decision Or Any Ultimate Merits Determination.

At the time of these settlements, this Court had not ruled upon plaintiffs' motion for class certification. Indeed, the settlements were reached after the Fifth Circuit decided *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), which defendants touted as the certain death knell for plaintiffs' class certification motion. Importantly, both agreements provided that neither would be contingent upon class certification. Hence, the settlements guaranteed the class $10 million plus interest against the risk of noncertification.

Moreover, whatever the outcome of this litigation on the merits, the class will still receive this settlement fund. Although plaintiffs believe this is an excellent case on liability and damages, litigants must always be mindful of Judge Wyatt's observation in the Antibiotics litigation:

> It is known from past experience that no matter how confident one may be of the outcome of litigation such confidence is often misplaced.

State of West Virginia v. *Chas Pfizer & Co.*, 314 F. Supp. 710, 743-44, *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub. nom. Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971). Interestingly, Judge Wyatt buttressed this point by noting two cases in which settlements were disapproved but in which the plaintiffs ultimately recovered less than the rejected settlement amount or lost on the merits. *See Piccard* v. *Sperry Corp.*, 36 F. Supp. 1006 (S.D. N.Y. 1971), *aff'd*, 120 F.2d 328 (2d Cir. 1941); *Upson* v. *Otis*, 155 F.2d 606 (2d Cir. 1946).

In this case, too, success cannot be foretold with certainty. Until the jury returns a verdict for plaintiffs and damages are assessed, risks will be ever present—the

law may take an unfavorable turn, the facts may not develop as expected, etc.* The instant settlements represent a hedge against those risks and a source of funding for continuing expenses.

Although plaintiffs did not have the benefit of merit discovery prior to entering the settlement agreements,** plaintiffs did have substantial factual materials upon which to make an informed judgment in weighing the benefits of the settlements at such time against the risks of further litigation. These materials included:

(a) The indictments and, in the case of International Paper, the extensive bill of particulars filed recently by the Government in the criminal case.***

(b) Documents produced by defendants to the Houston Grand Jury.***

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* For instance, Congress may well, during the pendency of this case, pass Illinois Brick legislation that might adversely affect the rights of direct purchasers to recover the entire overcharge resulting from defendants' activities. By removing that possibility with respect to St. Regis and International Paper, the settlements provide a very substantial benefit to the direct purchaser class, and the courts have recognized this benefit in assessing the reasonableness of settlements. *See e.g., In Re Anthracite Coal Antitrust Litigation,* 1978-2 Trade Cas. ¶ 62,292 (M.D. Penn. 1978).

** If it were necessary to engage in merit discovery before settling a class action, then no class action could ever be settled prior to certification, given the *Manual's* recommendation that merit discovery be stayed pending class certification. *See* Manual § 1.40. To the contrary, the *Manual* suggests the possibility of settlement prior to certification, *see* Manual § 1.21, and this Court has recognized that possibility. *See Magana* v. *Platzer Shipyard, Inc.,* 74 F.R.D. 61 (S.D. Tex. 1977).

*** To be sure, plaintiffs' review of the Grand Jury documents at the time of the International Paper settlement had been undertaken primarily for purposes of obtaining material

(c) Extensive memoranda and affidavits submitted by defendants in response to plaintiffs' class action motion.

(d) Motions and memoranda filed by defendants in the criminal case.

(e) Statistics of the Fiber Box Association relating to sales of corrugated containers and sheets.

(f) Arthur Andersen reports relating to economic conditions in the corrugated products industry.

(g) The opinion and record in *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969), and the opinion in *United States* v. *Consolidated Packaging Corporation*, 575 F.2d 1171 (7th Cir. 1978).

In addition, plaintiffs were guided by the following concepts: First, where liability has not been established, single damages have been considered an appropriate method for evaluating a proposed settlement. The Second Circuit explained this principal in *City of Detroit* v. *Grinnell Corp.*, 494 F.2d 448, 458-459 (2d Cir. 1974):

> While it is true that treble damages are extracted from a Defendant who ultimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of Courts which have approved settlements in this type of case, even though they may not have

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relevant to the class action hearing, and the bill of particulars had been filed only a few days prior to reaching agreement with International Paper as to the amount of its settlement. Nevertheless, the reasonableness of the instant settlements must be viewed in light of what plaintiffs knew at the time the agreements were entered. To hold otherwise, to assess the reasonableness of settlements in light of hindsight, would make it impossible to settle any class action.

> explicitly addressed the issue, have given their approval of settlements which are traditionally based on an estimate of single damages only . . . . Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires Defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that Defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base liability figure would force defendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

Second, the four year statute of limitations has been utilized in judging the adequacy of an antitrust class settlement and, therefore, in developing a settlement formula. As noted by Judge Metzner in *City of Detroit* v. *Grinnell Corp., supra,* at 1386:

> . . . [I]n most of the settlements approved in other class action antitrust cases, the period has been 4 years which is the statute of limitations for such actions. . . .

Third, plaintiffs endeavored to develop a settlement formula bearing some relationship to the realities of the marketplace and the ability of defendants to respond in damages.

Fourth, early settling defendants should be entitled to a substantial discount, since early settlements encourage other defendants to come to the bargaining table, provide a source of funding for the litigation, and can assist plaintiffs' discovery program.

Operating within these general guidelines, the Steering Committee, using available information, calculated each settling defendant's approximate average percentage share of all defendants' container and sheet sales during the period 1972 through 1976. St. Regis accounted for approximately 3.97% of defendants' share of the market, and International Paper accounted for approximately 8.3%.

With respect to St. Regis, the first defendant to settle, after extensive negotiations the Steering Committee arrived at a minimum figure of $1.7 million, which was believed to be the maximum amount St. Regis would agree to pay prior to class certification, given the other terms of the settlement, particularly the *Illinois Brick* provision.

Subsequently, after extensive negotiations with International Paper, the Steering Committee determined to settle with that defendant for no less than $1 million per percentage point or $8.3 million, more than twice the amount per point paid by St. Regis. The higher amount was used because International Paper is a felony indictee, and was not the first defendant to settle.*

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* It should go without saying, of course, that plaintiffs are in no way bound by any formula or dollar figure per point used in these early settlements. Plaintiffs are entirely free, and indeed fully intend, to increase the minimum settlement amounts per market share point now that the class has been certified and merits discovery is underway.

3. Settling Defendants Agreed To Provide Substantial Discovery Help To Plaintiffs.

The settlement agreements are intended to provide plaintiffs with substantial cooperation and assistance from the settling defendants with respect to discovery material. In the absence of agreement, plaintiffs might never obtain some of this material or obtain it only after lengthy motion battles. By getting such materials at this stage, plaintiffs expect their discovery to be more efficient and effective against the non-settling defendants.

IV.

Conclusion

Plaintiffs are offering for the Court's approval only *two* settlements; thirty-five highly solvent corporate defendants remain. For several reasons, as discussed herein, plaintiffs are willing to settle with St. Regis and International Paper at substantially lower amounts than will be expected from the remaining defendants. These early settlements will not in any way affect the amounts recoverable from non-settling defendants.

Thus, for the reasons stated herein, plaintiffs respectfully urge that these settlements be tentatively approved, that the class be so informed, and that a date be set for

formal hearing on their fairness, adequacy, and reasonableness.

Respectfully submitted,

MANDELL & WRIGHT
Stephan D. Susman, Chairman,
Plaintiffs' Steering Committee
Gary V. McGowan
Robert D. Daniel
806 Main Street, 21st Floor
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KOHN, MILSTEIN & COHEN
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By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf Of Plaintiffs

[Certificate of Service omitted]

EXHIBIT A

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH
DEFENDANT ST. REGIS PAPER COMPANY

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 as a class action on behalf of themselves and other persons who were direct purchasers of corrugated containers and corrugated sheets as hereinafter defined:

WHEREAS, plaintiffs alleged that defendant St. Regis Paper Company (hereinafter "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise,

maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement ("Agreement") to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interests of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these actions be settled and compromised with Settling Defendant, upon approval of this Court after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Settlement and the Agreement.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

"All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978."

4. The class shall be represented in MDL No. 310 by all parties in all cases to which this Agreement relates.

5. In full and complete settlement of the claims asserted in these actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit $1,700,000.00 in cash, in escrow, as described hereinafter, on or before the date of execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund." Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorneys fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice.

6. Settling Defendant agrees, at its cost, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as identified in paragraph 3) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K.

Opperman, or their designees, as escrow agents and attorneys for the class. Any interest earned on the Fund shall become and remain a part thereof.

8. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the administration and distribution of the Settlement Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until there has been approval of the Settlement in MDL No. 310, pursuant to Rule 23 of the Federal Rules of Civil Procedure, entry of a final judgment, the time for appeal has expired, and an Order of the Court allowing such distribution.

10. Upon such approval pursuant to said Rule 23, all claims as against Settling Defendant shall be dismissed with prejudice.

11. The Settlement shall not become effective unless the Settlement Class defined in paragraph 3 hereof is certified as to Settling Defendant pursuant to F.R.Civ.P. Rule 23(e) and this Settlement Agreement is approved in MDL No. 310 in all respects by the Court, and, in the event that the Court refuses to approve this Agreement or any material part of it, the entire Agreement shall become null and void unless all parties promptly agree to proceed with the Settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be disbursed to Settling Defendant, except that any costs of administering the Fund or this Settlement, exclusive of attorneys fees, shall first be deducted before the Fund is returned to Settling Defendant.

12. The fact of this Settlement with Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of non-settling defendants for the conspiracy and other acts alleged in the Complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Settlement Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant on the checks or claim forms.

13. If within fifteen (15) days after the date fixed by the Court for members of the class to exclude themselves in MDL No. 310 pursuant to said Rule 23, Settling Defendant in its sole judgment, shall reasonably determine that requests for exclusions from the class have been made by potential class members representing significant purchases, this Agreement, at the option of Settling Defendant, shall be terminated. Such option shall be exercised, if at all, within such fifteen (15) day period by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

14. In the event that on or before December 31, 1978, Congress passes legislation which becomes effective, and which affects the potential rights of indirect purchasers in this litigation, Settling Defendant shall also have the option to terminate this Agreement unless a plan of allocation of the Fund among direct and indirect purchasers is developed to the satisfaction of all parties and approved by the Court within one (1) year after such legislation becomes effective. Said option shall be exercised, if at all, by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

15. This Agreement shall become effective upon its execution by the undersigned counsel.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101

KOHN, MILSTEIN & COHEN
Jerry S. Cohen
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CORINBLIT, SHAPERO & SELTZER
Jack Corinblit
3700 Wilshire Boulevard, Suite 820
Los Angeles, California 90010

COOPER & SCARPULLA
Joseph Cooper
300 Montgomery Street, Suite 600
San Francisco, California 94104

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee and All Class Action Plaintiffs

LeBoeuf, Lamb, Leiby &
MacRae
H. Richard Wachtel
140 Broadway
New York, New York 10005

Akin, Gump, Hauer & Feld
Mayo J. Thompson
2800 Republican National
Bank Building
Dallas, Texas 75201

By: /s/ *H. Richard Wachtel*
H. Richard Wachtel
On Behalf of St. Regis Paper
Company

EXHIBIT B

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH
DEFENDANT INTERNATIONAL PAPER COMPANY

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action on behalf of themselves and other persons who were direct purchasers of corrugated containers and corrugated sheets as hereinafter defined;

WHEREAS, plaintiffs alleged that defendant International Paper Company (hereinafter "Settling Defend-

ant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interest of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

> "All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978."

4. Said Settlement Class shall be represented in MDL No. 310 by all parties in all cases to which this Agreement relates.

5. In full and complete settlement of the claims asserted in these class actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit $8,300,000.00, in cash, in escrow, as described hereinafter, on or before the date of execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund". Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorney fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice.

6. Settling Defendant agrees, at its cost, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as described in para-

graph 3 hereof) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K. Opperman, or their designees, as escrow agents and attorneys for the class. Any interest earned on the Fund shall become and remain a part thereof. The Settling Defendant shall be advised with respect to the bank or banks issuing such certificates of deposit and the amount thereof and receive reports, on request, on the status of the Fund.

8. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the administration and distribution of the Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23 of the Federal Rules of Civil Procedure, the entry of the Court's final order or judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the plaintiffs and the Settlement class members, the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment, and an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by the plaintiffs or plaintiffs' counsel in these MDL proceedings, (b) such distributions may be made from time to time on an interim

basis prior to the time when the remaining balance of the Fund may be distributed to Settlement class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

10. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23, said final order or judgment shall be entered which shall provide that all claims of the plaintiffs and the members of the Settlement Class as against Defendant, which have been, are now or could be asserted in these actions and which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated complaint on file herein, shall be dismissed with prejudice; *provided*, however, that said final order or judgment shall not be entered unless and until the time within which the Settling Defendant may withdraw from or terminate this Agreement and the settlement set forth herein pursuant to the provisions of paragraphs 13 or 14 has expired (without such withdrawal or termination having taken place).

11. The settlement set forth in this Agreement shall not become effective unless and until the Settlement Class defined in paragraph 3 hereof is certified as to the Settling Defendant pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and this Agreement is approved in MDL No. 310 in all respects by the Court, and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be dis-

bursed to Settling Defendant, except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant.

12. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the non-settling defendants for the conspiracy and other acts alleged in the complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant on the checks or claim forms.

13. If within fifteen (15) days after the date fixed by the Court for members of the Settlement Class to exclude themselves in MDL No. 310 pursuant to said Rule 23, Settling Defendant in its sole judgment, shall reasonably determine that requests for exclusions from the class have been made by potential class members representing significant purchases, this agreement, at the option of Settling Defendant, shall be terminated. Such option shall be exercised, if at all, within such fifteen (15) day period by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

14. In the event that on or before December 31, 1978, Congress passes legislation which becomes effective, and which affects the potential rights of indirect purchasers in this litigation, Settling Defendant shall also have the option to terminate this Agreement unless a plan of allocation of the Fund among direct and indirect purchasers is developed to the satisfaction of all parties and approved by the Court within one (1) year after such legislation becomes effective. Said option shall be exer-

cised, if at all, by service of written notice of the election to withdraw on undersigned counsel by registered mail with a copy filed with the Court.

15. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pursuant to paragraph 10 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure;

(b) Settling Defendant agrees to retain, pending the final disposition of all cases involved in these MDL procedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof.

(c) Settling Defendant further agrees, upon request and subject to any orders of the Court, to promptly produce such documents or evidence to designees of Plaintiffs' Steering Committee. Provided, however, that if Settling Defendant has a

good faith reason to believe that any such evidence or document was obtained by it pursuant to a co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas and that such evidence or document is protected by the attorney-client privilege or attorneys' work-product privilege belonging to a person or party other than Settling Defendant, then Settling Defendant may postpone production of such document or evidence for thirty (30) days following receipt of the request therefor if within ten (10) days of such receipt, Settling Defendant has given written notice of such request to such person or party and to Plaintiffs' Liaison Counsel, which notice shall have specifically identified the documents or evidence thought to be privileged. Thereafter, at the expiration of such thirty (30) day period, such document or evidence shall be produced unless the Court order otherwise. If any order of the Court bars Settling Defendant from producing any such documents or evidence, or if any person moves for the entry of such an order, Settling Defendant will take no position on any such motion or with respect to any application by plaintiffs to seek Court approval of the production by Settling Defendant of such document or evidence.

(d) Settling Defendant agrees, upon request by Plaintiff's counsel, to make its officers, employees and agents available, as witnesses at depositions at such places as may be designated by plaintiffs' counsel and at the trial of these actions, without regard to the territorial limitations of the process of the court where such proceedings may take place or the place where such person resides or is employed or transacts business.

(e) Nothing herein is intended: (1) to prevent any officer, employee or agent of Settling Defendant from asserting, where appropriate, any Fifth Amendment privilege against self-incrimination or any attorney-client privilege held by him in his individual capacity; (2) to require Settling Defendant to breach any attorney-client or attorney's work-product relationship it has entered into with any third party as a result of any co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas; (3) to constitute a waiver by Settling Defendant of its attorney-client or attorney's work-product privilege as to any documents or evidence prepared or information obtained by Settling Defendant, subsequent to the execution of this Agreement, in connection with its defense in the criminal proceeding in the Southern District of Texas to which it is a party; (4) to require the disclosure of the impressions or thought processes of Settling Defendant's attorneys; (5) to extend to any non-parties to this Agreement the waiver by Settling Defendant provided for herein for the benefit of plaintiffs; or (6) to prevent plaintiffs from discovering any documents, evidence or information that would otherwise be discoverable under the Federal Rules of Civil Procedure.

16. Plaintiffs agree that, under present circumstances, they will not enter into a settlement of the class actions in MDL 310 with any similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraph 14 or paragraph 5 of this Agreement without offering similar terms to Settling Defendant hereunder.

17. This Agreement shall become effective upon its execution by the undersigned counsel as of August 24, 1978.

MANDEL & WRIGHT
Stephen D. Susman, Chairman
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DOHERTY, RUMBLE & BUTLER
Vance K. Opperman,
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Houston, Texas 77002

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On behalf of Plaintiffs'
Steering Committee and All
Class Action Plaintiffs

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RICHARD M. MCCOSTIS
International Paper Company
220 East 42nd Street
New York, New York 10017

By: /s/ *Henry L. King*
HENRY L. KING
On Behalf of International
Paper Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

ALL ACTIONS EXCEPT

DEAN FOODS COMPANY, ET AL.,
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO., ET AL.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AFFIDAVIT ON BEHALF OF ST. REGIS PAPER COMPANY IN SUPPORT OF SETTLEMENT AGREEMENT

Filed December 4, 1978

State of New York)
: ss.:
County of New York)

H. Richard Wachtel, being duly sworn, deposes and says:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby and MacRae of New York City, and one of the attorneys for defendant St. Regis Paper Company. I make this affidavit to provide certain of the background facts leading to the agreement of settlement between all class action plaintiffs in this litigation and St. Regis.

2. Although I have some recollection of conversations with members of the class plaintiffs' Steering Committee on the occasion of the first pre-trial conference in this action held before Honorable John V. Singleton on February 8, 1978, the first such communication reflected in my diary was a telephone conversation initiated by me on February 13, 1978 with Jerry Cohen, Esq., who among other things, advised me that Stephen Susman, Esq. was chairman of Plaintiffs' Steering Committee. My telephone conversation with Mr. Cohen was followed by telephone conversations with Mr. Susman on February 17 and February 21. In these telephone conversations, I pointed out that it was extraordinary for private treble damage actions based on federal criminal proceedings to be filed until indictments were returned; that the plaintiffs in these private treble damage actions had "jumped the gun" and had named as defendants all firms that had responded to grand jury subpoenas *duces tecum;* and that now that the grand jury had acted and the government had determined not to seek an indictment against St. Regis, suggested that plaintiffs should withdraw their action against St. Regis. I do not recall precisely what response was made to those remarks, but the conversation led to a discussion of the possibility of settlement with St. Regis.

3. During my discussion with Mr. Susman on February 21, he said that he had considered the matter of settlement with the Plaintiffs' Steering Committee, and they had determined that it was inadvisable to commence discussions on this subject until the Court was advised

that the parties intended to pursue them. I concurred, and we considered ways and means of so advising the Court. Accordingly, on February 22, a conference call to Judge Singleton was arranged in which Mr. Lezar of Mandell & Wright spoke on behalf of the plaintiffs, and I spoke on behalf of St. Regis. After hearing us, Judge Singleton stated that it was not inappropriate for the parties to consider settlement. There followed a series of telephone conversations with Jack Corinblit, Esq. (on March 7, March 9 and March 13) to set up a meeting for a settlement discussion with a delegation of Plaintiffs' Steering Committee. I recall that, in one of these conversations, Mr. Corinblit said something to the effect that St. Regis was the first plaintiff seeking such a meeting and the Committee expected that I would come to the meeting fully informed and would have with me appropriate market statistics.

4. On March 14, I met in a meeting room at O'Hare Airport in Chicago with Messrs. Cohen and Corinblit. My diary does not reflect the actual time spent at that meeting, but my recollection is that I had breakfast with Mr. Corinblit some time in mid-morning and then met with him and Mr. Cohen until late in the afternoon. Preliminarily there was a discussion of background facts regarding the industry and earlier investigations and litigation involving it. My client, St. Regis Paper Company, had been involved in many of these proceedings, and I described them briefly to Messrs. Cohen and Corinblit.

5. At the meeting, I described the trade association programs for reporting sales and production information and reviewed with them schedules which I had prepared showing the various defendants' share of market of corrugated products over the period January 1, 1970 through December 31, 1977. Attached as Exhibit A to this affidavit is a copy of the papers I had with me, all of which were made available to plaintiffs' counsel for

their inspection at that time. Before we left the hotel where the conference took place, Mr. Cohen made xerox copies of those sheets on a coin-operated machine.

6. In the course of describing the litigation involving the corrugated industry, I pointed out that, following the decision in *United States* v. *Container Corporation*, 393 U.S. 333 (1969) and the entry of an injunction by the District Court, St. Regis had put into effect a compliance program which had been carefully monitored so that none of the injunction's provisions would be violated and that, while the decree only applied to the Southeastern United States, St. Regis had decided in 1970 to apply it to its corrugated operations on a nation-wide basis. I was involved in many of the lecture sessions designed to instruct those St. Regis employees having pricing authority regarding the provisions of the decree. I told the plaintiffs' lawyers that I was informed regarding the St. Regis testimony before the Houston grand jury and that I was convinced that plaintiffs could not prevail in the action. The St. Regis documents which had been submitted to the grand jury and were later filed in the depository, pursuant to Pre-Trial Order No. 3 dated April 14, 1978, in my view, supported this position.

7. We turned to the amount of money St. Regis would be willing to pay to settle the case. In view of my conviction that St. Regis would prevail in the litigation, I thought the discussion ought to be conducted in terms of the prospective litigation expense to St. Regis on the one hand and, since St. Regis would be the first settling defendant, the support which such a settlement would give to the plaintiffs in their pursuit of other defendants. I was authorized at the time to settle for as much as $250,000 and, rather than dickering with the attorneys on the other side, offered the full amount. Messrs. Cohen and Corinblit retired from the meeting room for 20 minutes or half an hour and returned to advise me that my

offer was not acceptable. We continued our conversation, however, for about an hour and agreed that further discussions might prove to be useful. I recall that during that hour it was observed by either one of the plaintiffs' attorneys or by me that, if all the other unindicted container manufacturers who had been named as defendants in the treble damage suits settled on the same basis, a litigation fund for the pursuit of the claims against the indicted companies would be produced in the amount of approximately $2½ million. Messrs. Cohen and Corinblit emphasized that that was a ridiculously small amount, and I disagreed.

8. My next meetings with any of the plaintiffs' lawyers were informal talks with Mr. Susman in the lobby of the Shoreham American Hotel in Washington, D.C., on the occasion of the Spring Meeting of the Antitrust Section of the American Bar Association during the first week of April. Market information was not considered in these brief exchanges, but rather remarks that, on the one hand, the offer must be increased very substantially and responses, on the other, that the offer made was substantial given the extraordinary circumstances of the inclusion of St. Regis in the case.

9. My diary reflects telephone conversations with Mr. Corinblit on May 9 and with Mr. Susman on May 12. The latter led to a meeting with Messrs. Susman, Corinblit and Opperman at the offices of Mandell & Wright in Houston on May 15. At this meeting we again reviewed market share statistics and debated the amount of a St. Regis settlement in terms of St. Regis' willingness to go "a little higher" on the one hand and the plaintiffs' insistence that the number approach "seven figures".

10. Two days later, after a pre-trial conference held on May 17, I spoke with Messrs. Susman and Corinblit. By this time, pursuant to Pre-Trial Order No. 3, St. Regis had deposited all of the documents returned pur-

suant to the grand jury subpoenas *duces tecum*, no one of which suggested that St. Regis had participated in any conspiracy. In addition, the motion of the defendants in Crim. H-78-11 and in Crim. H-78-12 to dismiss the indictments on account of grand jury abuse, which included numerous exhibits going to the merits of the case, had also been filed. Nothing in that voluminous filing, either, demonstrated that St. Regis was involved in any conspiracy. I got the impression from those conversations that the plaintiffs felt more secure in their ability to prevail in the motion to certify classes and, for whatever reason, I was told that "the price has gone up" and, if St. Regis was serious about settlement, I would have to be authorized to deal with plaintiffs in terms of over a million dollars. After discussions with my client, I had a telephone conversation with Mr. Susman on May 24 in which I recall I indicated we should try once more to settle the case. We spoke on the telephone again on June 21.

11. My diary reflects a number of telephone calls with Mr. Susman and Mr. Cohen on June 26, and several conversations with Mr. Susman on June 27. During one of these conversations, I was advised by Mr. Susman that he had spoken with each member of Plaintiffs' Steering Committee, and that he had been instructed to present a "take it or leave it" offer to St. Regis of $1.7 million. This was not an effort to lend some weight to the "seven figure" concept earlier advanced at the meeting at Mandell & Wright on May 17th, or split the difference between a million dollars and the $250,000 which St. Regis had last offered. Mr. Susman made it clear that he wanted a "yes" or "no" answer, not a counteroffer. I undertook to provide him with one.

12. After meeting with members of my client's senior management and extensive discussions and debates as to what St. Regis' answer would be, and after discussions

with Mayo Thompson, Esq., St. Regis' trial counsel in this matter, it was finally decided that St. Regis would respond affirmatively to plaintiffs' offer. At the same time, it was decided that, if St. Regis would pay this amount of money, it should have a meaningful right to withdraw from the settlement both in the event of legislation repealing the decision in *State of Illinois* v. *Illinois Brick Company*, 431 U.S. 720 (1977), and also in the event that the Court failed to grant the contested motion to certify a class pursuant to Rule 23(c). St. Regis had the agreement of the plaintiffs, in the settlement of the *Fine Paper* treble damage actions against it pending in the Eastern District of Pennsylvania, that St. Regis could withdraw from the settlement in the latter event. I insisted that the same provision be included in a settlement agreement if one should be reached terminating the class plaintiffs' action against St. Regis in these corrugated container cases. During one of these discussions, I also indicated that we would want plaintiffs to agree to drop any damage claim against the other defendants based on purchases from St. Regis, *i.e.*, that St. Regis' sales should be excluded from the damage claims against other defendants.

13. These telephone conversations led to a meeting on July 6 at the offices of Wolf, Block, Schorr and Solis-Cohen in Philadelphia. There were present at the meeting Messrs. Susman, Kohn, Corinblit, Opperman, my partner, Grant Lewis, and myself. At that meeting, for the first time, new requests were made of St. Regis as a condition to a settlement of the case. First, we were asked to make available to plaintiffs' counsel the transcripts of testimony of St. Regis witnesses who appeared before the grand jury in Houston. In addition, we were asked to produce all documents furnished to any governmental agency suggesting that corrugated containers were fungible, a demand made in order to sustain plain-

tiffs' position that a nation-wide conspiracy of the product in question was feasible, which proposition they said might become important on the merits and might be relevant in the motion to certify class pursuant to Rule 23.

14. At that meeting we responded to the requests for grand jury testimony by indicating that my client would not stand in the way of such access. However, I told the group of plaintiffs' lawyers that only one St. Regis witness testified before the grand jury and that one had been interviewed and, to the extent that they could be made available, they would be produced. In telephone conversations a few days later, I advised Mr. Susman that the attorney representing those two St. Regis employees (Hugh Steger, Esq. of Dallas, Texas) was resisting the efforts of the defendants in the criminal cases to have the transcripts of these employees turned over for use in the defendants' motion to dismiss the indictments.

15. With respect to the request for documents furnished to any governmental agency, we undertook to make documents turned over by St. Regis to the Cost of Living Council available to the extent that they had been retained. We subsequently collected the Cost of Living Council materials and advised the plaintiffs' attorneys that they were available at our office for inspection and copying. We then turned to the conditions which would permit St. Regis to withdraw from the settlement. We negotiated at length about the timing of *Illinois Brick* legislation which would give rise to an "out" for St. Regis. Representatives of St. Regis had previously discussed this subject with Congressional Committee staff, and based upon what had been learned in these visits and from other sources, I advised the plaintiffs' group that it was our view that *Illinois Brick* legislation would not be passed during this term of Congress and that we needed protection against legislation through the end of

1979. They insisted that the matter could remain subject to a condition of this character only until the end of this year. We finally acceded to language which incorporated the plaintiffs' position.

16. We then discussed the right of St. Regis to withdraw from the settlement in the event the Court denied plaintiffs' motion to certify classes pursuant to Rule 23(c). We pointed out that we had obtained this type of agreement in the *Fine Paper* cases, but were adamantly resisted on this issue. After discussion with my partner, Grant Lewis, we returned to our discussions with the plaintiffs' lawyers and acceded to an agreement without this provision.

17. I had earlier indicated the probability that St. Regis would agree to a payment of $1.7 million but, at that time, stated my client's insistence upon settlement provisions granting a right to withdraw upon the happening of the conditions hereinabove described. In view of the counsel for plaintiffs' refusal to agree to these provisions and St. Regis' agreement to cooperate, to the extent indicated, the amount of payment was in my view still open for discussion. Rather than haggle about the amount, however, I told the group that I would recommend a settlement for $1.7 million on the basis reached at the meeting. Thereafter, on July 11, the matter was presented at a special meeting of the St. Regis Board of Directors at which Mr. Lewis and I appeared and spoke for approximately 2½ hours. I communicated St. Regis' authorization of the settlement to Mr. Susman who told me that he had to obtain approval from the attorneys in each of the actions filed on behalf of classes. This process took several days. I was then advised that each plaintiff's attorney had been called and the settlement was now authorized by every plaintiff. On July 20, St. Regis' check in the amount of $1.7 million payable to the order of Messrs. Susman and Opperman as Escrow

Agents and Attorneys for the Class was delivered to Mr. Susman, together with counterparts of the settlement agreement signed by me on behalf of St. Regis.

/s/ *H. Richard Wachtel*
H. RICHARD WACHTEL

Subscribed and sworn to before
me this 1st day of December,
1978.

/s/ [notary]

[Exhibit omitted]

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. Docket No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Filed December 11, 1978

Defendant Westvaco Corporation ("Westvaco") hereby moves this Court for leave to amend its answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a cross-claim for contribution against defendants International Paper Company and St. Regis Paper Company, in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the Westvaco Answer as of right has expired.

On December 6 and 7, 1978 the undersigned counsel for Westvaco conferred in person by telephone with the following counsel for the following parties.

Counsel	Parties	Time
H. Richard Wachtel Grant S. Lewis LeBoeuf, Lamb, Leiby & MacRae	St. Regis Paper Co.	afternoon of Dec. 6 & 7
Henry L. King Davis, Polk & Wardwell	International Paper Co.	afternoon of Dec. 6 & 7
Stephen D. Sussman Mandell & Wright	Chairman, Plaintiffs' Steering Committee	morning of Dec. 6, afternoon of Dec. 7

All the above have informed Westvaco's Counsel that they intend to oppose this Motion.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York 10022
Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. Docket No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Defendant Westvaco Corporation ("Westvaco") seeks leave of Court to amend its Answer to the Unified and Consolidated Complaint to assert a cross-claim for contribution against defendants International Paper Company ("IP"), and St. Regis Paper Company ("St. Regis"). Westvaco's original Answer was filed on June 29, 1978.

Standards for Granting Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court is necessary where, as here,

a party's right to amend its pleadings as a matter of course has expired. The Rule provides that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

This standard for the granting of leave to amend has been reaffirmed by the Supreme Court in *Foman* v. *Davis*, 371 U.S. 178 (1962), where the Court stated:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." 371 U.S. at 182.

Although the grant or denial of leave to amend is within the discretion of the district court, refusal of leave to amend without justification is considered to be an abuse of discretion and inconsistent with the spirit of the Federal Rules. *Foman* v. *Davis*, *supra*, at 182. *Accord Sherman* v. *Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972); *Harkless* v. *Sweeny Independent School District of Sweeny, Texas*, 554 F.2d 1353 (5th Cir. 1977); *Hilgeman* v. *National Insurance Company of America*, 547 F.2d 298 (5th Cir. 1977).

I.

THE COURT SHOULD GRANT WESTVACO LEAVE TO AMEND ITS ANSWER

A. *Justice and Efficiency Require that Westvaco Be Allowed to Assert its Claim For Contribution.*

A claim for contribution against a co-defendant is properly brought as a cross-claim under Fed. R. Civ. P. 13(g).* 3 J. Moore, *Federal Practice* ¶ 13.34[1] (2d Ed. 1978). The rationale behind allowing cross-claims is set forth in Wright & Miller, *Federal Practice and Procedure*, as follows:

> [T]he general policy behind allowing cross-claims is to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps. In keeping with this policy the courts generally have construed [Rule 13(g)] liberally in order to settle as many related claims as possible in a single action. Wright & Miller, *supra* at § 1431, at 161.

The cross-claim which Westvaco seeks to assert herein pertains directly to and arises from the action filed by the plaintiffs against the defendants. Although Westvaco emphatically denies that it has in any way violated the antitrust laws, it must protect itself from the risk, however remote, of being found liable to the plaintiffs and thereafter burdened with a disproportionate share of the

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* Rule 13(g) states in pertinent part:

> Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

liability asserted against the defendants jointly and severally. The cross-claim provides this protection.

Westvaco suggests that the Court should not rule upon the substantive merits of Westvaco's cross-claim for contribution at this time. Instead, Westvaco contends it should be allowed to assert its cross-claim in the instant action so that the Court may fairly and effectively adjudicate Westvaco's claim at the conclusion of the trial after it has heard all of the evidence. *See e.g., McLean* v. *Alexander*, 449 F. Supp. 1251 (D. Del. 1978).

Denying the cross-claim and relegating its substance to a new and separate action before a different court would involve an inordinate waste of time of the Court and the parties and would be unreasonably costly in terms of duplication in pleadings, discovery, trial time and the unnecessary expenditure of judicial effort in redetermining matters which have been already adjudicated.

Westvaco recognizes that the law is unsettled as to whether in an antitrust action contribution among defendants is proper. The United States Supreme Court has yet to address this issue and at the present time three cases are on appeal before the United States Courts of Appeals for the Fifth, Eighth and Tenth Circuits in which the question of the right to contribution among antitrust defendants is presented. *Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 78-1788 (5th Cir. docketed, April 14, 1978) (argued December 5, 1978), *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, No. 78-1229 (8th Cir. docketed March 30, 1978) (argued September 14, 1978); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, No. 77-2068 (10th Cir. docketed December 20, 1977). Accordingly, Westvaco respectfully submits that the Court should not rule on the legal merits of its cross-claim for contribution while the law is so unsettled.

Should it be settled that contribution is proper, then this Court, having allowed Westvaco's cross-claim, will have retained jurisdiction over the settling defendants for the purpose of determining a just and equitable apportionment of the damages, if any, among those who are said to have caused the plaintiffs' alleged injuries in a single proceeding. In the meantime the settling defendants will not have been prejudiced by this Court now granting Westvaco's motion. It is clear that the interests of justice and judicial economy dictate that Westvaco's claim to contribution be ultimately adjudicated in this action and this can be accomplished most easily by granting Westvaco's motion to amend its answer.

B. *Grant of Leave to Amend Would in No Way Prejudice Any Other Party.*

Westvaco has acted promptly after learning of the putative settlements between plaintiffs and IP and St. Regis which involve the possible dismissal of said defendants from this action. There can be no prejudice to any other party to the action arising from Westvaco's amendment of its answer to assert the proposed cross-claim for contribution. Both IP and St. Regis remain party-defendants to several non-class actions which are part of MDL 310. Furthermore, pursuant to paragraph 15(a) of its proposed settlement, IP remains a party to all of the class action cases for discovery purposes. In addition, it would seem that St. Regis has agreed to participate on a limited basis in discovery in this action (See Memorandum In Support of Plaintiffs' Motion for Tentative Approval of Proposed Partial Settlements with Defendants International Paper Company and St. Regis Paper Company at p. 3). Thus, the assertion of Westvaco's claim will not require an expansion of discovery in MDL 310. Likewise, Westvaco's cross-claim does not affect the plaintiffs' choice of parties-defendant because it does not bring in any additional parties. Consequently

allowance of Westvaco's cross-claim will cause no delay in the time for trial.

II.

Conclusion

For the foregoing reasons, Westvaco respectfully submits that leave to amend its Answer to assert a cross-claim for contribution should be granted.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS, Esq.
919 Third Avenue
New York, New York 10022
(212) 371-6000
Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

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(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

AMENDED ANSWER AND CROSS CLAIM OF DEFENDANT WESTVACO CORPORATION TO THE UNIFIED AND CONSOLIDATED COMPLAINT

Defendant, WESTVACO CORPORATION ("Westvaco"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom, answers the Unified And Consolidated Complaint (the "complaint") herein as follows:

1. Admits that the complaint purports to be a Unified And Consolidated Complaint pursuant to an Order of this Court filed on March 2, 1978 and the Stipulation dated May 16, 1978 and So Ordered on May 31, 1978

and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1 of the complaint.

2. Denies each and every allegation contained in Paragraphs 2, 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the complaint.

3. Denies each and every allegation contained in Paragraph 5 of the complaint except admits that the actions identified in Exhibit I to the complaint were transferred to this Court from the districts in which they were commenced pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977 (*In re Corrugated Container Antitrust Litigation*, 442 F. Supp. 921 (Jud. Pan. Mult. Lit. 1977)).

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the complaint except admits that the names listed in Exhibit I to the complaint purport to be the names of plaintiffs in this litigation.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 7 and 9 of the complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the complaint except admits that Westvaco is a Delaware corporation with its principal place of business in New York, New York and is engaged in the business of manufacturing and selling corrugated containers and corrugated sheets in certain geographical areas of the United States.

7. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraphs 14 and 15 of the complaint and states that the

description of the trade and commerce in corrugated containers set forth therein is inaccurate and incomplete.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint except admits that Westvaco at various times during the period covered by the complaint has sold corrugated containers and corrugated sheets in certain geographical areas of the United States.

FIRST AFFIRMATIVE DEFENSE

9. The complaint fails to state a claim against Westvaco upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. The claims alleged in the complaint against Westvaco are barred in whole or in part by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs lack standing to assert a claim against Westvaco for damages or equitable relief.

FOURTH AFFIRMATIVE DEFENSE

12. The complaint does not allege an appropriate class action and this litigation is not maintainable as a class action.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs are not entitled to invoke the aid of any Court because they are guilty of unclean hands and have acted in bad faith.

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs have been guilty of such laches as to preclude them from invoking the aid of any Court.

SEVENTH AFFIRMATIVE DEFENSE

15. The Court lacks jurisdiction over the person of Westvaco.

EIGHTH AFFIRMATIVE DEFENSE

16. Venue of this cause is improper.

CROSS-CLAIM AGAINST DEFENDANTS INTERNATIONAL PAPER COMPANY AND ST. REGIS PAPER COMPANY

17. Defendant International Paper Company ("IP") at all times mentioned in the complaint and in this answer was and is a corporation duly organized under the laws of the State of New York.

18. Defendant St. Regis Paper Company ("St. Regis") at all times mentioned in the complaint and in this answer was and is a corporation duly organized under the laws of the State of New York.

19. IP has entered into a proposed settlement ("IP Settlement") of the cause of action alleged in the complaint, which settlement is being submitted to the Court for approval. A copy of said IP Settlement is annexed hereto as Exhibit A and made a part hereof.

20. St. Regis has entered into a proposed settlement ("St. Regis Settlement") of the cause of action alleged in the complaint which settlement is being submitted to the Court for approval. A copy of the St. Regis Settlement is annexed hereto as Exhibit B and made a part hereof.

21. Under the terms of the IP and St. Regis Settlements the Court is being requested to dismiss the complaint against the said defendants IP and St. Regis and to permit these actions to proceed against all the other defendants including Westvaco.

22. With the possible exception of defendants IP and St. Regis, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the other defendants therein.

23. In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against Westvaco, then Westvaco is entitled to receive appropriate contributions from the defendants IP and St. Regis.

24. By settling, as alleged in paragraphs 19, 20 and 21 hereof, defendants IP and St. Regis are attempting to avoid their obligations to make appropriate contributions to Westvaco as alleged in paragraph 23 hereof if after trial plaintiffs should obtain a judgment against Westvaco.

25. Westvaco has advised IP and St. Regis that it intends to hold IP and St. Regis liable for their appropriate contributions to Westvaco as set forth in this cross-claim and has demanded that IP and St. Regis should either participate in the trial of these actions, or be bound by the results thereof. Copies of the demands are annexed hereto and made a part hereof as Exhibits C and D respectively.

WHEREFORE, defendant Westvaco Corporation demands:

A. Judgment dismissing plaintiffs' complaint herein with prejudice together with the costs and disbursements of this action including reasonable attorneys' fees, and

such other and further relief as this Court may deem just and proper; and

B. Judgment against defendants IP and St. Regis (i) for their respective appropriate contributions to Westvaco in the event there is any liability to the plaintiff by Westvaco, (ii) for costs and disbursements of this cross-claim including reasonable attorneys' fees and (iii) for such other and further relief as this Court may deem just and proper.

Dated: December 7, 1978

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York 10022
(212) 371-6000

Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long, Esq.
Ralph R. Ferney, Esq.

[Exhibit A: Agreement of Settlement with Defendant International Paper Company. See Joint Appendix, pages 53-63.]

[Exhibit B: Agreement of Settlement with Defendant St. Regis Paper Company. See Joint Appendix, pages 46-52.]

EXHIBIT C

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York 10022

December 6, 1978

BY HAND

International Paper Company
220 East 42nd Street
New York, N.Y. 10017

Attention: William L. Lurie, Esq.
Vice President and
General Counsel

Dear Sirs:

This is to inform you that in the unlikely event a judgment should be entered against Westvaco Corporation in the actions entitled *In Re Corrugated Container Antitrust Litigation*, M.D.L. No. 310 now pending in the District Court of the United States for the Southern District of Texas, Houston Division, Westvaco will demand appropriate contribution from you.

In this connection on behalf of Westvaco we demand that you either participate in the trial of the above actions if one is required or be bound by the results thereof.

Very truly yours,

Leslie H. Arps
Counsel for
Westvaco Corporation

cc: Henry L. King, Esq.
Thomas R. Long, Esq.

EXHIBIT D

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York 10022

December 6, 1978

BY HAND

St. Regis Paper Company
150 East 42nd Street
New York, N.Y. 10017

Attention: Homer Crawford, Esq.
Vice President and
Secretary

Dear Sirs:

This is to inform you that in the unlikely event a judgment should be entered against Westvaco Corporation in the actions entitled *In Re Corrugated Container Antitrust Litigation*, M.D.L. No. 310 now pending in the District Court of the United States for the Southern District of Texas, Houston Division, Westvaco will demand appropriate contribution from you.

In this connection on behalf of Westvaco we demand that you either participate in the trial of the above actions if one is required or be bound by the results thereof.

Very truly yours,

Leslie H. Arps
Counsel for
Westvaco Corporation

cc: H. Richard Wachtell, Esq.
Thomas R. Long, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS

SUPPLEMENTAL MEMORANDUM OF CERTAIN DEFENDANTS IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER PROHIBITING DISCLOSURE OF PRIVILEGED DOCUMENTS OR INFORMATION

I. *Preliminary Statement*

This memorandum is filed on behalf of the undersigned defendants ("non-settling defendants") in support of their Motion for a Protective Order Prohibiting Disclosure of Privileged Documents or Information. After that motion and a supporting memorandum were filed, other papers were filed by various parties with respect to the principal subject matter of the motion, paragraph 15 of the class action plaintiffs' Agreement of Settlement with Defendant International Paper Company ("I.P. Settlement Agreement"). Additionally, the plaintiffs have sought to implement the discovery procedures contained in paragraph 15, thereby confirming the obvious need for relief from this Court to protect non-settling defendants' rights. In light of the various papers that have been filed and the events surrounding the initial effort by the plaintiffs to invoke the provisions of paragraph 15, non-settling defendants have attached to this memorandum as Appendix A a proposed protective order that

they believe should be entered. This memorandum is submitted to clarify for the Court the very limited relief that non-settling defendants seek by their motion for a protective order and to respond to the papers that have been filed.[1]

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[1] Attached to non-settling defendants' motion for a protective order was a proposed order that was believed at that time to be necessary and appropriate to protect the rights of non-settling defendants. That proposed order was designed essentially to require that, notwithstanding the provisions of paragraph 15, there would be no disclosure of documents or information by I.P. to the plaintiffs if such materials were subject to a privilege belonging to a third party or parties, including non-settling defendants, without their consent. Non-settling defendants still believe that such an order would be appropriate in the circumstances. It is believed, however, that the proposed order submitted with this memorandum is perhaps more desirable in light of the events that have occurred since the filing of the motion for a protective order and should not be objectionable to the plaintiffs or to I.P. for any legitimate reason.

The settlement agreement previously entered into by St. Regis Paper Company does not contain a provision comparable to paragraph 15 of the I.P. Settlement Agreement. Nevertheless, St. Regis apparently has made some agreements with the plaintiffs regarding production of documents or other materials by St. Regis. *See* Affidavit on Behalf of St. Regis Paper Company in Support of Settlement Agreement ¶¶ 13-15; Memorandum in Support of Plaintiffs' Motion for Tentative Approval of Proposed Partial Settlements with Defendants International Paper Company and St. Regis Paper Company at 2-3, 7. Accordingly, although paragraph 15 provided the initial impetus for the filing of non-settling defendants' motion, the proposed order attached to this memorandum relates not only to discovery from I.P. but also to discovery requests directed to any defendant in addition to I.P. that has entered into, or may enter into, a settlement arrangement with any plaintiff in MDL No. 310.

In essence, the proposed protective order attached to this memorandum would require first that all defendants be given notice by plaintiffs immediately upon their serving any request upon a settling defendant for the production of documents or other materials by requiring service upon all defendants of a copy of any such request. The settling defendant would be required to segregate from the materials it believes are responsive to the request all of the documents or other materials it believes are subject to a privilege or immunity from disclosure that belongs to any third party, or that may contain information subject to any such privilege or immunity, as well as other documents or materials that were generated in connection with joint-defense efforts in these or other proceedings. As soon as the settling defendant has segregated these materials, it would then be obligated to give notice of that fact to the other defendants, who then would be given an opportunity, within ten days from the receipt of such notice, to inspect the segregated materials and to advise the settling defendant that they object to the production of specified documents or materials. The specified materials would not be produced, but rather would be retained by the settling defendant, appropriately identified, in the event that their production is later sought by a motion to compel discovery.[2] Under this procedure, there would be no delay of production of any documents or materials that were generated in the ordinary course of business by officers or

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[2] This procedure also would provide that the identity of such documents, the production of which has not been made because of a third-party objection, may not be disclosed to plaintiffs by the settling defendant, its counsel or its officers and employees, either in other discovery or by any other means, except in a manner to which the objecting party has consented. Any dispute regarding this procedure can be brought to the Court's attention by means of a motion to compel discovery.

employees of the settling defendant and that were not generated in connection with or in relation to any joint-defense efforts in these or other proceedings.

Essentially, what the proposed protective order would do is to provide nothing more than a fair opportunity for non-settling defendants to review a very limited portion of any production proposed to be made by a settling defendant, thereby ensuring that privileged material will not be inadvertently disclosed. In contrast to the important rights of non-settling defendants that are placed in jeopardy if no such procedure is adopted, the suggested procedure does not work to the detriment of the plaintiffs or the settling defendant. The minimal delay encountered by plaintiffs surely cannot impair in any way their ability to prosecute their cases, as, even with the request already made of I.P., production could be accomplished prior to production by non-settling defendants pursuant to plaintiffs' requests that have been made under normal discovery procedures. Similarly, the documents to be reviewed by non-settling defendants would be those that the settling defendant had a reasonable basis for believing might be subject to a privilege or immunity from production belonging to a third party or parties. All non-settling defendants would receive is merely an opportunity to review them either to confirm the settling defendant's judgment that these documents or materials in fact are subject to the privilege or privileges of another, or to advise the settling defendant that no privilege can or will be asserted. All that is proposed, therefore, is a fair opportunity to assert important rights that otherwise could be irreparably damaged.

Non-settling defendants submit that the reasonableness of this approach simply cannot be questioned, in light of significance of the joint-defense doctrine in this litigation. As stated in non-settling defendants' initial memorandum in support of their motion for a protective

order, the *Manual for Complex Litigation* stresses the importance of joint-defense efforts in complex litigation and, more important, that participation in such efforts shall not be considered as a waiver of privileges belonging to the participants. *Manual for Complex Litigation* § 1.92 (1977). This Court, moreover, has recognized the importance of this principle, particularly in Pretrial Order No. 3, which expressly provides that participation by counsel in joint-defense efforts "shall not be construed as a waiver of any attorney-client, work product or other privilege." Pretrial Order No. 3 at 9-10.

The significant policies underlying this rule cannot be overlooked. The elimination of duplicative efforts by numerous parties who share common interests necessarily requires that consultation relating to their collaborative efforts must be capable of being carried out free of the fear that the content of such communications might be disclosed to opposing litigants. Were it not for this protection, such efforts would become, as one court has described it, an "improbable alternative".[3] The multiplicitous and uncoordinated efforts of the dozens of parties in MDL No. 310 that would result from a breakdown of joint-defense efforts provides the clearest evidence of the importance of the rule of confidentiality that non-settling defendants seek to protect.

Beyond this the non-settling defendants will not restate in this memorandum the arguments and authorities set forth in their initial memorandum, which amply support the relief requested. Rather, the following section of this memorandum describes pertinent matters that have occurred since the non-settling defendants' motion was filed. Section III of this memorandum considers certain of the plaintiffs' contentions to which non-settling defendants

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[3] *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975).

believe a response is necessary. Non-settling defendants believe that, particularly in the context of this background, the limited relief they seek clearly is appropriate.

II. *Pertinent Facts*

Paragraph 15, after obligating I.P. to retain all documents or other evidence in its possession, custody or control or in the possession, custody or control of its attorneys or other agents relating to the subject matter of MDL No. 310 (I.P. Settlement Agreement ¶ 15(b)), requires I.P., upon request, "to promptly produce such documents or evidence" to plaintiffs (*id.* ¶ 15(c)). This provision, however, also contemplates that some of such documents and evidence would be subject to a privilege belonging to persons or parties other than I.P., by providing:

> . . . if [I.P.] has a good faith reason to believe that any such evidence or document was obtained by it pursuant to a co-operative defense effort in the proceedings related to the corrugated container industry in the Southern District of Texas and that such evidence or document is protected by the attorney-client privilege or attorneys' work-product privilege belonging to a person or party other than [I.P.], then [I.P.] may postpone production of such document or evidence for thirty (30) days following receipt of the request therefor if within ten (10) days of such receipt, [I.P.] has given written notice of such request to such person or party and to Plaintiffs' Liaison Counsel, which notice shall have specifically identified the documents or evidence thought to be privileged. Thereafter, at the expiration of such thirty (30) day period, such document or evidence shall be produced unless the Court order [sic] otherwise. If any order of the Court bars [I.P.] from producing any such documents or evidence, or if any person

> moves for the entry of such an order, [I.P.] will take no position on any such motion or with respect to any application by plaintiffs to seek Court approval of the production by [I.P.] of such document or evidence.

I.P. Settlement Agreement ¶ 15(c).

That this purported attempt to protect the rights of others falls far short of what is required in the circumstances is self-evident on the face of this contractual language. Thus, I.P. *may* produce all documents and other information, even if subject to the privilege of another, without any notice to those parties to whom the privilege belongs. Moreover, I.P. *is required* to do so *without objection* unless the holders of the applicable privilege are able promptly to obtain a court order prohibiting production after having been notified of I.P.'s belief that the material requested is protected by a privilege belonging to them. The protection of important privileges thus is left subject not only to the exercise of discretion by I.P. and its counsel, parties to whom the privileges in question do not belong, but also to the exigencies of a possible hurried effort to seek court protection in the face of threatened and imminent production.

But the inherent defects in this provision are best evidenced by the plaintiffs' first attempt to invoke the procedures that paragraph 15 would make available to them.[4] By letter dated October 4, 1978, from Henry L.

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[4] This Court, of course, has recognized that such an attempt to seek production of documents was premature because the I.P. Settlement Agreement has not been approved by the Court. *See* Transcript of October 17, 1978, Pretrial Conference at 181-90. Nevertheless, that effort by plaintiffs, as well as their later motion to seek production of documents from I.P. that, they assert, are not even "arguably subject" to a

King, counsel for I.P., the non-settling defendants were advised for the first time that a voluminous request for production of documents had been served on I.P. by plaintiffs on September 29, 1978, purportedly pursuant to paragraph 15 of the I.P. Settlement Agreement.[5] The plaintiffs' September 29 request to I.P. sought production of documents described in a total of 54 paragraphs, and this voluminous production was requested to be made within 14 days of the request.

The stated purpose of the letter from Mr. King was to notify plaintiffs and the non-settling defendants, pursuant to paragraph 15(c) of the I.P. Settlement Agreement, that I.P. and its counsel had reason to believe that some of the material requested by plaintiffs was obtained pursuant to a cooperative defense effort and subject to the attorney-client or attorney's work-product privileges of defendants or parties other than I.P. By the time this "notice" from Mr. King was sent to (not received by) the non-settling defendants, however, more than one-third of the brief 14-day period of time for the requested production already had elapsed.[6] Moreover, this letter described

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privilege of any party other than I.P., makes it clear that a protective order now is necessary to prevent possibly irreversible breaches of important confidences as well as potential disruption of the orderly handling of this litigation.

[5] The September 29 request and Mr. King's October 4 letter are attached as Exhibits B and C, respectively, to the Response of International Paper Company to Motion for Protective Order Prohibiting Disclosure of Privileged Documents or Information ("I.P. Response").

[6] Additionally, although paragraph 15(c) provides that, if I.P. gives notice to plaintiffs and non-settling defendants pursuant to that paragraph, I.P. *may* postpone production for up to 30 days, such a postponement occurs only if I.P. decides to do so. There was no indication in Mr. King's letter, however, that the requested production would be made on a schedule other than as requested by plaintiffs.

the material I.P. believed to be privileged merely by stating that the material requested by certain paragraphs of the request is or may be subject to attorney-client or work-product privileges of parties other than I.P. In fact, regarding several paragraphs of the request, Mr. King's letter stated that documents responsive to such paragraphs might exist that are subject to such privileges, but that, "[i]n the very short time period since receipt of Plaintiffs' Letter, we have not had an opportunity to review IP's files to determine whether there are any documents responsive to such requests."[7]

On October 13, 1978, Mr. King wrote to plaintiffs regarding the September 29 production request, to set forth certain objections of I.P. to the production of some of the requested material.[8] In this letter Mr. King stated I.P.'s recognition that there were materials in its possession

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[7] Although paragraph 15(c) of the I.P. Settlement Agreement provides that notice pursuant to that paragraph shall "have specifically identified" the materials about which such notice is given, such specificity was lacking in Mr. King's letter, to the detriment of the non-settling defendants. Hence, the non-settling defendants were placed in a position of having to seek court protection to preserve important confidences that might exist without even knowing precisely what documents or materials were involved. The non-settling defendants do not fault Mr. King for failing to provide such specificity about such a voluminous request in such a short period of time; rather, this serious deficiency is compelling evidence of the totally improper and unworkable attempt in paragraph 15(c) to protect the rights of others that are so clearly affected by that paragraph. Moreover, as will be demonstrated, specific notice *to plaintiffs*, as is seemingly called for by paragraph 15(c), is itself improper and could jeopardize the rights of non-settling defendants. *See* nn 17-18 *infra*.

[8] Mr. King's October 13 letter is attached as Exhibit D to the I.P. Response.

that were subject to privileges belonging to parties other than I.P. or that were subject to other restrictions upon their production.[9]

After the filing of non-settling defendants' motion for a protective order and after the plaintiffs' September 29 request, both plaintiffs and I.P. filed separate papers responding to non-settling defendants' motion.[10] In essence, I.P. stated that the pertinent portions of paragraph 15 are clear and that non-settling defendants have misinterpreted that agreement. By contrast, the plaintiffs,

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[9] Mr. King's letter stated in pertinent part:

> At the outset, we wish to call to your attention the fact that among the pre-trial orders entered by the Court in the Houston corrugated proceedings there are three such orders that restrict production of some of the requested materials. The Interim Protective Order entered by the Court in the Houston criminal cases on April 3, 1978 restricts the dissemination of all documents or the contents thereof which were placed in the government document depository established in those cases to counsel, parties, and officers or employees of parties required to work directly on those cases. All transcripts of grand jury and grand jury interview testimony in the possession of IP or its counsel given in the investigation of the corrugated container industry were placed in the document depository by the government pursuant to Pre-trial Order No. 2 in the Houston criminal cases dated April 6, 1978, and thus are subject to the restrictions of the Interim Protective Order. In Pre-trial Order No. 3 entered in M.D.L. 310, the Court instructed the defendants to enter into a cooperative defense relationship, with the specific provision that any cooperative defense effort would not be construed as a waiver of an attorney-client, work-product or other privilege.

[10] I.P. Response; Memorandum in Opposition to Motion by Non-settling Defendants for Protective Order ("Plaintiffs' Memorandum").

while failing to set forth any significant reasons for denying protection of important rights of non-settling defendants, make the incredible contention that, notwithstanding any possible claim of privilege, I.P. should be allowed "voluntarily" to produce any documents it may wish to turn over to the plaintiffs even if I.P.'s counsel is precluded from doing so. Plaintiffs' Memorandum at 8-16. Hence, while I.P. exhorts non-settling defendants to rely upon the supposed clarity of the pertinent provisions of the I.P. Settlement Agreement and I.P.'s representations that it did not intend, by agreeing to the provisions of paragraph 15, to "waive" any privileges belonging to non-settling defendants,[11] the plaintiffs simultaneously assert that I.P. is under no duty to protect confidences shared with it if it "voluntarily" elects not to do so, and that, in stark contrast to I.P.'s assertions, "IP has effectively and properly waived either the attorney-client or attorney work product privilege that otherwise may have attached . . . ." Plaintiffs' Memorandum at 16-17.

III. *Neither I.P. Nor Its Counsel May, Voluntarily or Otherwise, Produce Privileged Documents and Information Obtained by Them Pursuant to Joint-Defense Efforts.*

Although non-settling defendants believe that there can be no question about the need for the protective order requested, we feel compelled to respond to certain of the patently erroneous contentions that plaintiffs have made in their attempt to question a rule of confidentiality the

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[11] Although I.P. speaks of its intention not to "waive" the privileges of others, it is important to remember that the privileges in question are not I.P.'s to waive. Rather, I.P. is in the position of one duty bound to maintain the confidence entailed by a privilege unless the party or parties to whom it belongs choose to waive it.

existence of which this Court and all of the parties, including plaintiffs, have recognized throughout this litigation. In substance, the plaintiffs contend that I.P. voluntarily may disclose documents and other information that have come into its possession pursuant to joint-defense efforts among I.P. and others notwithstanding that such materials may be subject to privileges belonging to others.[12] Thus they first imply broadly that communications by codefendants in the presence of both I.P. and attorneys are not subject to an enforceable privilege, presumably because I.P., as distinguished from its attorneys, was a direct recipient of such communications. Plaintiffs' Memorandum at 8-9. Plaintiffs' statement that "this appears to be a question of first impression" shows not that there is an absence of case law on the question but rather that plaintiffs apparently have not read the cases cited in their own memorandum. To the contrary, in several of the reported cases dealing with the joint-

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[12] Although the plaintiffs state in their memorandum that non-settling defendants are seeking "extraordinary" relief and that the protection they seek is unduly broad (Plaintiffs' Memorandum at 1, 5-7), it is the plaintiffs' contentions that properly may be characterized as overbroad. For example, plaintiffs assert that "one reading of defendants' motion suggests that defendants would bar disclosure of direct communications between IP and any of the attorneys involved in these proceedings." *Id.* at 7. To the extent that privileged communications originated from I.P. and consisted of material or information, subject to a privilege belonging solely to I.P., that I.P. was making available to others pursuant to a joint-defense effort, non-settling defendants surely do not question I.P.'s right, if it so chooses, to waive its privilege and to make such material available to the plaintiffs. But the glossing over of this narrow category of materials by the use of the far broader term of "communications between IP and any counsel" clearly overlooks communications of which I.P. is the recipient and as to which a privilege of a party other than I.P. may apply.

defense doctrine, courts have held that applicable privileges were not waived in a joint-defense context even when the privileged matter in question was disclosed in the presence of the parties involved in the joint-defense efforts. *E.g.*, *Hunydee* v. *United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 386-89 (S.D.N.Y. 1975). Indeed, the supposed significance of the presence of counsel to the joint-doctrine is totally dispelled by the facts of *Grand Jury*, in which the court held that there was no waiver of applicable privileges with respect to meetings at which some codefendants were present without their counsel. 406 F. Supp. at 391.

Plaintiffs, however, seek to impose upon this authority an additional requirement that, for the joint-defense doctrine to remain intact, the parties who receive such confidential communications must remain willing to maintain the confidences reposed in them. They thus seek to distinguish between a *party* recipient and an *attorney* recipient of joint-defense communications, recognizing that the latter has a fiduciary duty not to breach the confidences reposed in him while contending that the former does not. Yet plaintiffs set forth no reasons why the fiduciary relationship arising in connection with joint-defense efforts is any less significant or less worthy of preserving because it arises between coparties rather than between a party and the counsel for a coparty.[13] In

[13] Although plaintiffs state that an attorney-recipient of such communications may, of course, have ethical obligations that prohibit disclosure, whether voluntary or otherwise, they also recognize that the basic underlying obligation in connection with joint-defense efforts arises from a "fiduciary relationship". Plaintiffs' Memorandum at 11-12. A fiduciary relationship, however, surely does not require that one of the parties to the relationship be an attorney. Rather, fiduciary

substance, plaintiffs' only asserted reason for drawing this distinction is that non-settling defendants supposedly must assume the risk "with respect to the . . . loyalty of their companions." Plaintiffs' Memorandum at 12. Yet it is in situations where there could be some question about the sanctity of a fiduciary's undertaking to maintain shared confidences that the obligations arising therefrom are most in need of preservation by the courts.[14]

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duties are imposed by the law where, either because of the parties' agreement or because of other special circumstances, there is a need to exact a standard of conduct from someone that is perhaps higher than that which would be required were it not for those special circumstances. I.P.'s status as a non-attorney cannot give it a license to repudiate the fiduciary responsibilities it has undertaken in connection with joint-defense efforts in this or any other litigation or proceedings. *See American Standard, Inc.* v. *Bendix Corp.*, 71 F.R.D. 443, 447 (W.D. Mo. 1976) (duty imposed upon nonparties to litigation not to disclose work-product material given to them because of their agreement to keep such material confidential).

[14] Plaintiffs' attempts to support their position wholly miss the point. The cases they point to as ones involving a rule limited to nondisclosure *by attorneys* (Plaintiffs' Memorandum at 10-11) did not address any distinction, as plaintiffs seek to create, between voluntary as opposed to compelled disclosure. Moreover, in at least one of those cases (*Hunydee* v. *United States*, 355 F.2d 183 (9th Cir. 1965), testimony was sought from both a codefendant and her attorney relating to confidential communications in the course of joint-defense efforts. The court held that neither could testify; the rule was no different for the party than it was for the attorney. *Id.* at 184-85. Moreover, the facts in *Hunydee* indicate that the proposed disclosure in question was voluntary, resulting from an agreement by a codefendant and her counsel to cooperate with the Government in prosecution of her codefendant husband in exchange for her own exoneration. 355 F.2d at 184.

Plaintiffs' reliance upon the purportedly "analogous" area of the law regarding informants and turncoat witnesses in

Non-settling defendants do not read into I.P.'s actions in connection with its settlement with the class action plaintiffs the kind of turncoat conduct envisaged by plaintiffs in their memorandum. Rather, I.P. appears to have recognized its obligations as a participant in joint-defense efforts. But non-settling defendants believe that, notwithstanding any such recognition, the procedures for production of documents and other information set forth in paragraph 15 are wholly inadequate to protect their rights. Moreover, the mere suggestion by plaintiffs of a vast and unprecedented exception to the joint-defense doctrine that would allow "voluntary" disclosure of shared confidences by parties to such efforts cannot go unanswered for fear that silence would be construed as acquiescence in so unfounded a rule.

In this regard, it is worth noting one court's reaction to a similar attempt to construe the joint-defense rule narrowly, as plaintiffs seek to do:

> [T]o allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative. How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration . . . . The attorney-client privilege . . . should not thus be whittled away.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975). No rule could present such danger to the continued viability

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criminal cases is equally deceptive. Plaintiffs' Memorandum at 12-13. Stated quite simply, those cases deal with rules of criminal procedure in connection with fourth amendment protections against unreasonable search and seizure, and they do not involve, nor are they relevant to, any consideration of privilege in connection with joint-defense efforts.

of joint-defense efforts as clearly as the one now posited by plaintiffs.[15]

Plaintiffs' contentions with respect to the work-product immunity in the joint defense context are wholly incongruous. After conceding that the work-product immunity is a right held by the attorney, "which can be waived by, and only by, the attorney", and that an attorney may share his work product with counsel for codefendants in the joint-defense context without waiving his or their right to assert the immunity, plaintiffs somehow would create a right to disclose such work product "voluntarily . . . either by public utilization or by private disclosure to others." Plaintiffs' Memorandum at 15. It is simply inexplicable, however, that such disclosure could be made when it is subject to an immunity from disclosure that has not been waived by the very parties who, as plaintiffs concede, possess the sole right to effect such a waiver. It is equally absurd to state that the work product generated or received by I.P.'s counsel as part of joint-defense efforts may be disclosed if I.P. so chooses because such materials possibly would have been created or learned by I.P.'s counsel in connection with I.P.'s defense even if no joint-defense efforts had been undertaken. *See* Plaintiffs' Memorandum at 15-16. Such pure speculation cannot offset the obvious fact that work

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[15] While plaintiffs here contend that a "meaningful" cooperative defense could be carried out under the restrictions they would impose, it should be noted that they have not hesitated to promote the use of joint-defense efforts when it happens to suit their convenience. For example, in Plaintiffs' Joint Memorandum Re Proposed Discovery Program and Schedule, recently filed with the Court, plaintiffs stressed the need for channelling all of the discovery in these cases through centralized committees; there the plaintiffs suggested assignment to committees or lead counsel of "substantive pretrial duties," even though each party may have its own independent interest and its own counsel. *Id.* at 4.

product generated as part of a joint-defense effort is the work product of all counsel participating in that effort, which, in these cases, has been mandated by this Court.[16]

The fundamental unfairness of the procedure contained in paragraph 15 of the I.P. Settlement Agreement

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[16] Plaintiffs subtly suggest an additional purported basis upon which they should be entitled to material in I.P.'s possession that is subject to a privilege belonging to another party over the objection of that party, by alluding to the rule that the attorney-client privilege is not a bar to disclosure in controversies *inter sese* between parties who formerly shared a confidential and hence privileged relationship. Plaintiffs' Memorandum at 5 n.*, 10 n*. Again, however, plaintiffs have seriously mischaracterized the precedent they cite, by implying that it supports a "right" of I.P. to produce (presumably to anyone, including plaintiffs) "all communications" to its attorneys or to any attorney regarding the merits of this litigation in the event that non-settling defendants object to court approval of the I.P. settlement and hence create a "controversy" between themselves and I.P.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975), the only case cited by plaintiffs to support this contention, clearly requires a different result. The court there noted the restrictive application that has been, and properly must be, given to this exception to the rule of nondisclosure:

> To be sure, confidence shared by joint defendants and their counsel are effectively shielded against outside access. On the law established to date, that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation.

Id. at 394. To find the requisite "controversy" in an effort by one defendant to prevent disclosure of privileged materials by a coparticipant in joint-defense efforts would create the anomalous result of having an attempt to prevent disclosure actually divest the materials of the privilege that provides the basis for preventing disclosure.

emanates from the fact that the class action plaintiffs, by an agreement to which they and a settling defendant alone are parties, seek to reverse completely the discovery procedures usually applicable to protection of privileged material. Thus, in the usual discovery procedure, the plaintiffs, who are seeking discovery of privileged material, would have to seek court approval to obtain it. Fed. R. Civ. P. 34(b) (if objection is made to requested production, party seeking discovery may move for an order to compel discovery under rule 37(a)). Under paragraph 15(c), however, the holder of the privilege would be forced to seek a court order to prevent production.[17] There is absolutely no reason why, by settlement agreement or otherwise, the plaintiffs should be allowed to bring about such a disruption of the discovery process and thereby place the rights of others in jeopardy.[18]

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[17] Plaintiffs suggest in their memorandum that the solution to all of non-settling defendants' objections is for them to prepare a list of all "purportedly privileged" materials, supposedly pursuant to "their duty to identify the relevant communication." Plaintiffs' Memorandum at 4. Plaintiffs, however, cite no authority for this supposed "duty to identify" and, it is clear, none is available; on the contrary, it is established that there is no such duty, even in the usual discovery context, when such identification would itself disclose the privileged content. *See, e.g., Duplan Corporation* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1156-58 (D.S.C. 1975); *United States* v. *Anderson*, 34 F.R.D. 518, 523-25 (D. Colo. 1963). It is even more questionable, therefore, to suggest that such a duty should be imposed upon non-settling defendants because they seek to forestall production of documents by another to protect their privileges, the continued preservation of which might be threatened by such production.

[18] Moreover, the kind of specific disclosure seemingly required of a paragraph 15(c) notice not only is not practicable within the short time frame provided, but also is

IV. *Conclusion*

The basic fallacy underlying plaintiffs' asserted reasons for denying non-settling defendants' motion for a protective order is their failure to recognize that the privileges and immunities in question belong to parties other than I.P. or any other settling defendant and that the documents and other information to which these privileges apply have come into the possession of settling defendants and their counsel because of their participation in joint-defense efforts. As discussed above, such joint-defense efforts depend largely upon the assurance that all participants will maintain the confidences reposed in them by codefendants and their counsel. The procedures plaintiffs would follow, as suggested by the language of paragraph 15(c) of the I.P. Settlement Agreement and as evolved in connection with their September 29 request to I.P., also overlook this fact. Whatever purpose may be intended to be served by paragraph 15 of the I.P. Settlement Agreement or any similar provision, there is absolutely no basis for allowing plaintiffs, by virtue of an agreement with a settling defendant, to impair the abilities of others to assert their privileges.

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improper because it is to be directed both to the holders of the applicable privilege and *to plaintiffs*. It is clear that there are instances in which a mere description of privileged material may be sufficient effectively to disclose the privileged content; in such cases, there is no duty to make a specific disclosure to an adverse litigant. *See* note 17 *supra*. Yet the notice procedure contemplated by paragraph 15(c) necessarily places I.P. and its counsel in the position of having to choose between specific identification that could effectively breach a confidence reposed in them or failing to particularize, thereby requiring the holders of the privilege to seek its protection amidst the uncertainty of not knowing precisely which documents I.P. believes are responsive to a particular request to produce.

Thus, for all of the foregoing reasons, this Court should enter a protective order in the form of the proposed order attached hereto as Appendix A.

Respectfully submitted,

/s/ *Cloyd R. Mellott*
CLOYD R. MELLOTT
Eckert, Seamans, Cherin & Mellott
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

On behalf of the defendants listed on the following page.

Dated: December 11, 1978

The foregoing is filed on behalf of the following defendants:

Alton Box Board Company
Boise Cascade Corporation
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Inland Container Corporation
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
The Mead Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
U.S. Corrugated—Fibre Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries, Inc.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:

CORRUGATED CONTAINER
ANTITRUST LITIGATION

PRETRIAL HEARING

December 14, 1978

* * * *

[18] THE COURT: I believe I am correct. However, I stand to be corrected. There is such a volume of papers filed in these cases that I cannot always keep in my head what has been filed and what hasn't, but I don't believe that I have read any opposition by any of the defendants to a preliminary approval of these settlement agreements.

If anybody wants to speak to that, I'd be glad to listen to them.

MR. JEFFERS: Your Honor, what I have to submit I think would be appropriately submitted at this time.

For the record, I am Leroy Jeffers, counsel for the defendant, Inland Container Corporation.

What I have to say is not addressed to the total approval or disapproval of the proposed settlement agreements but rather to the submission to the Court of two conditions which [19] Inland Container Corporation and a substantial number of the other defendants, at least—

THE COURT: The non-settling defendants, you mean?

MR. JEFFERS: Non-settling defendants—believe should, in the exercise of the Court's discretion, be attached as conditions to preliminary approval.

The first one that I would like to submit to Your Honor is the proposal that preliminary approval of the settlement agreements should be conditioned upon the removal from the area of damages applicable to the non-settling defendants, the amounts of the sales, the market shares of the settling defendants. It is an issue that those who have researched it tell me is now pending before courts of appeals in at least three different cases. It has not yet been definitively decided, but it seems to me that addressing this to the discretion of the Court and the equities involved, that such a [20] condition should be attached on general principles. It is well established that an antitrust treble damage plaintiff cannot have double recovery for the same injuries. He gets treble damages on the injury which does occur, but he cannot recover more than once for the same injury.

Your Honor had such a matter before you in the case of *Woods Exploration and Producing Company* vs. *Aluminum Company of America* in which Your Honor held—and while the Fifth Circuit improvidently reversed the judgment for the defendants in that case, they did sustain Your Honor upon the ruling by which you enjoined the plaintiffs from proceeding in a state court action against the same defendants based upon the same facts and the same injury, the law being well settled that the plaintiff simply cannot recover twice for the same injury.

If the sales of the settling defendants are left in the damage area, exactly that would occur.

[21] The matter was again before the courts in the case of *Martin* vs. *Phillips Petroleum Company*, tried before Judge Connolly during his lifetime, in which case I was also counsel. And in that case, after a federal court trial, the state court of appeals sustained a state trial court in holding that there could not be a second recovery

in the same court predicated upon the same facts and the same injury; that while the federal court recovery, when there is recovery, is trebled, that you cannot, in the first instance, find anything more than single damages before trebling and there cannot be recovery upon the basis of the same injury twice.

And if you leave the sales of the settling defendants in the case as this settlement agreement undertakes to do as to the non-settling defendants, then the same injury, the same damages predicated upon those sales, according to the plaintiff's statement in support of approval of the settlement and according to the [22] provision of the settlement agreement as I interpret them, the same injury, the same damages, resulting from the same sales, could be repeatedly recovered upon time after time, in essence, so that if you ended up with a single defendant that went to trial in this case and all of the others had settled and thereby compensated for any injuries based upon their sales, still under the plaintiffs' theory recovery could be had against the sole remaining defendant for damages predicated upon the sales of all of the other defendants for which settlements had already been made.

So we submit to Your Honor that basic principles against double recovery and fairness and equity dictate that a condition should be attached to the preliminary approval of these settlement agreements to the effect that the sales of the settling defendants must be removed from the market upon which damages is claimed as to the non-settling defendants.

[23] The second proposition we wish to address to the discretion of the Court and the Court's equitable consideration and preliminary approval of these settlement agreements is that these settlement agreements have been entered into and are presented to the Court as being fair and reasonable settlement agreements. If they are fair and reasonable settlement agreements as to the Defend-

ants International Paper Company and St. Regis Paper Company, they are fair and reasonable settlement agreements as to all of the other defendants because the margin of time is not such as to alter that.

We have not yet plunged into this massive discovery program which lies ahead of us. At least 12 of the major market share defendants in this case stand ready at this time—and I will state upon the record—to enter into settlement negotiations with the plaintiffs on the basis of the International Paper Company settlement formula. And I [24] think I can say with reasonable certainty that a bulk of the litigation could be disposed of on that basis and a major market share removed from the litigation.

It is also my belief that upon the basis of the St. Regis Paper Company's settlement formula, that the bulk of the remaining defendants would be eager and ready to go forward with settlement negotiations so that judicial economy would be achieved, the best interest of the class for whom the plaintiffs have been certified to sue would be achieved by an early disposition of this litigation, in all likelihood, without the tremendous expense occurring of costs and attorneys' fees involved in this massive discovery schedule and in a trial of gargantuan length.

I do not purport, in making these statements to the Court, to speak for each and every defendant, but I do certainly speak for a substantial number of defendants.

So our proposal to the Court is [25] that there should further be attached to preliminary approval of the settlement agreements the condition that the same terms of settlement be made available to non-settling defendants similarly situated to the extent that such defendants may desire to take advantage of it. We think that while that may be innovative, it may not be something that there is a lot of case law or precedent on.

We do think that it would represent the splendid progressive management, judicial management, of this mam-

moth litigation and we urge those two considerations upon the Court.

Thank you, Your Honor.

THE COURT: As to your first proposition, Mr. Jeffers, that is the removal of the sales of the settling defendants from the consideration of damages, it occurs to the Court that that matter is premature at this time. It would seem to me that after a final settlement, if and when final settlement conference or approval by the Court of [26] any settlements and a notification to the class of those settlements occurs, then after that time and before any trial of the case, that that is an issue that should be discussed relative to the presentation of evidence at an actual trial.

As to your second proposition, the fair and reasonable, I will just comment on one remark you made about fair and reasonable as to the settling defendants. That, of course, while it is of some consideration to the Court, it is a relatively minor consideration because the fair and reasonable test is fair and reasonable to the class as a whole, not to the settling defendants.

MR. JEFFERS: I probably misspoke myself, Your Honor. I certainly intended to convey the argument and the thought that if it is fair and reasonable as to the class of plaintiffs in the instance of St. Regis and International Paper, that it would likewise be fair and reasonable to such class of plaintiffs in [27] the instance of these other defendants.

THE COURT: And as to your second proposition as a whole, of course, as you know, that matter has been informally discussed with the Court and the Court's position on that is, I believe, pretty clear at this point, and that is that whatever settlements the parties in this case wish to enter into, that is all well and good with the Court, but the Court is not at this time in any position to assert any active role in that matter for the reasons that I have already indicated.

Now, on this settlement—let me say this. I don't have the date in mind exact, but it seems to me that the class in this case was certified sometime in September or October. But, in any event, it has been some period of time.

Under the rules, the Federal—well, Rule 23 and the cases with which this Court is familiar, under that rule it is time that we address the issue of notification to the purported class and the form of notice to be prepared.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS EXCEPT

DEAN FOOD COMPANY, ET AL.
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

AGREEMENT OF SETTLEMENT WITH DEFENDANT BOISE CASCADE CORPORATION

Filed December 28, 1978

WHEREAS, certain plaintiffs are prosecuting MDL No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978, that these actions may proceed as a class action on behalf of the class as defined in said Order;

WHEREAS, plaintiffs alleged that defendant Boise Cascade Corporation (hereinafter the term "Settling Defendant" refers to Boise Cascade Corporation and includes the entity known as Boise Cascade Corporation and all of its predecessors, and for Boise Cascade Corporation and each such predecessor, all past and present subsidiaries, affiliates, unincorporated entities and divisions) was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, and the government trial exhibits made available to plaintiffs, and have conducted other formal and informal investigations and have concluded that a settlement with Settling Defendant in the amount hereinafter set forth is in the best interests of plaintiffs and the class;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settl-

ing defendant for any of the acts complained of by plaintiffs in any of their complaints, including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. For the purposes of this Agreement only, the undersigned agree that there shall be designated the following Settlement Class in MDL No. 310:

> All persons in the United States (excluding defendants and ~~all~~ subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978.

4. Said Settlement Class shall be represented by the class representatives designated by the Court in its Order dated October 26, 1978, or as may be otherwise designated by the Court.

5. In full and complete settlement of these class actions against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit Nine Million Eight Hundred Ninety-One Thousand and No./100 Dollars ($9,891,000.00), in cash, in escrow,

as described hereinafter, on or before the execution of this Agreement. Said amount and the interest thereon shall be referred to hereinafter as the "Fund". Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs (including the costs of notice to class members) or attorneys fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event Settling Defendant requests notice of this Settlement to be sent to members of the class prior to general notice of certification to class members, Settling Defendant will pay the costs of such notice. In the event federal income tax liability is finally assessed against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursement of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. Settling Defendant agrees, at its costs, to identify all class members in MDL No. 310 who purchased corrugated containers and sheets (as described in paragraph 3 hereof) from Settling Defendant to the extent that such information is available to Settling Defendant.

7. The Fund shall be invested in certificates of deposit in a bank by Stephen D. Susman and Vance K. Opperman, or their designees, as escrow agents and attorneys for the class. John T. Loughlin shall act as escrow agent for the Fund on behalf of Settling Defendant until entry of the Court's final order or judgment as provided in paragraph 10 of this Agreement. Any interest earned on the Fund shall become and remain a part thereof. The Settling Defendant shall be advised with respect to the bank or banks issuing such certificates of deposit and the amount thereof and receive reports, on request, on the status of the Fund. In lieu of the foregoing provisions of paragraph 7 of this Agreement, the parties may

agree to nominate a bank as escrow agent for the fund, which bank shall hold and disburse such funds pursuant to an escrow agency agreement in a form agreeable to the parties.

8. The escrow agents and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time only upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund except as expressly provided herein.

9. No distribution of the Fund shall be made until (i) the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final order or judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the plaintiffs and the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment, and (iv) an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by the plaintiffs or plaintiffs' counsel in these MDL proceedings, (b) such distributions may be made from time to time on an interim basis prior to time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the application of the Plaintiffs' Steering Committee and upon approval of the Court.

10. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final order or judgment shall be entered which shall provide that all claims of the plaintiffs and the members of the Settlement Class, as against Settling Defendant only, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein shall be dismissed with prejudice; provided, however, that said final order or judgment shall not be entered unless and until the time with which the Settling Defendant may withdraw from or terminate this Agreement and the settlement set forth herein pursuant to the provisions of paragraph 13 has expired (without such withdrawal or termination having taken place).

11. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is approved in MDL No. 310 in all respects by the Court, (including the approval of the Settlement Class, as defined in paragraph 3 hereof), and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, including, but not limited to, withdrawal by Settling Defendant, the Fund shall be disbursed to Settling Defendant, except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is ex-

pressly understood and agreed that this Settlement Agreement shall remain in full force and effect notwithstanding any revocation or modification by any court of the Court's September 6, 1978 Class Certification Order.

12. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the nonsettling defendants for the conspiracy and other acts alleged in the complaints, including but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its officers, directors or employees, under the antitrust laws of the United States or of any State or other jurisdiction, or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices or corrugated containers or sheets alleged in the Unified and Consolidated complaint on file herein, on the checks or claim forms.

13. The parties have agreed that the Settling Defendant may terminate this Agreement if requests for exclusion from the class are made by potential class members in an amount, and in accordance with the terms and conditions set forth in a separate agreement filed with the Court under seal.

14. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pur-

suant to paragraph 10 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure;

(b) Settling Defendant agrees to retain, pending the final disposition of all cases involved in these MDL proceedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof.

(c) Settling Defendant agrees to promptly deliver or otherwise make readily available to Plaintiffs' Steering Committee, subject to an agreed protective order and the provisions of paragraph 14(d), all documents and other evidence relevant to the claims in the Unified and Consolidated Complaint in Settling Defendant's possession, custody or control pursuant to requests made by Plaintiffs' Steering Committee.

(d) Nothing in this Agreement shall require Settling Defendant to provide any information or documents subject to an attorney work product, attorney client, Fifth Amendment or group defense privilege, or a court order of non-disclosure, nor shall such privileges be deemed waived.

(e) Settling Defendant shall, consistent with Settling Defendant's obligations, identify with particularity the information or documents which are subject to the provisions of paragraph 14(d) and the factual basis for the asserted privilege, to the extent that such identification does not constitute a breach of the asserted privilege.

(f) Nothing in this Agreement is intended or shall be construed to prevent plaintiffs from discovering any documents, evidence or information that would be otherwise discoverable under the Federal Rules of Civil Procedure.

15. Plaintiffs agree that, unless present circumstances materially change so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in MDL 310 with any such similarly situated defendant that is more favorable to such defendant insofar as it relates to paragraphs 5 and 13 of this Agreement, or any protective provisions based on federal legislation which effectively overruled *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), without offering similar terms to Settling Defendant hereunder; *provided*, however, that, with respect to paragraph 13 and said protective provisions, said Settling Defendant agrees to pay such additional amount as necessary to make the aggegate amount paid by settling Defendant proportionately equal to the aggregate amount paid by such other defendant.

16. This Agreement shall become effective upon its execution by the undersigned counsel as of the 27th day of December, 1978.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

VANCE K. OPPERMAN,
Vice Chairman,
Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101

By: /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks,* Designated Class Representatives (except Ilikon Corp.)** and All Reserve Class Action Plaintiffs (except Denver Meat Co., Townhouse Furniture, Penthouse Furniture, Ltd., Douglas Furniture Corp., André-Boudin Bakeries, Inc., and Salsbury Meats, Inc.,)

BOISE CASCADE CORPORATION

By: /s/ *John T. Loughlin*
JOHN T. LOUGHLIN

/s/ *R. Clifford Potter*
R. CLIFFORD POTTER
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle
Chicago, Illinois 60603

*And Jack Chestnut

** And Sambo's Restaurants, Inc.
Northland Aluminum Products

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER AND CROSS-CLAIM

Filed March 1, 1979

Defendant Westvaco Corporation ("Westvaco") hereby moves this Court for leave to amend its answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a cross-claim for contribution against defendants Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf

Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company, Willamette Industries, Inc., John Doe, Inc., and Richard Roe, Inc., (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action. This Motion supplements and incorporates a similar Motion filed by Westvaco Corporation on December 7, 1978, seeking to amend its answer to assert a cross-claim against defendants St. Regis Paper Co. and International Paper Co.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the Westvaco Answer as of right has expired.

In compliance with Local Rule 16 H(2), counsel for Westvaco have conferred in person by telephone with counsel for each of the Settling Defendants and counsel for plaintiffs (chairman of Plaintiffs' Steering Committee), and have been informed by said counsel that they intend to oppose this Motion. A schedule of those telephone conversations is annexed hereto as Schedule A.

Dated: February 27, 1979

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York
10022
Attorneys for
Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long
Ralph R. Ferney
Westvaco Corporation
299 Park Avenue
New York, New York 10017

SCHEDULE A

Counsel for Westvaco	Opposing Counsel	Parties	Time
Leslie H. Arps	H. Richard Wachtel Grant S. Lewis LeBoeuf, Lamb, Leiby & MacRae	St. Regis Paper Co.	afternoon of Dec. 6 & 7, 1978
Leslie H. Arps	Henry L. King Davis, Polk & Wardwell	International Paper Co.	afternoon of Dec. 6 & 7, 1978
Leslie H. Arps	Stephen D. Susman Mandell & Wright	Chairman, Plaintiffs Steering Committee	morning of Dec. 6, 1978, afternoon of Dec. 7, 1978
Nancy M. Higgins	John J. McHugh Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.	Container Corp. of America	morning of Feb. 22, 1979
Nancy M. Higgins	Leroy Jeffers Vinson & Elkins	Inland Container Corp.	morning of Feb. 22, 1979
Nancy M. Higgins	Richard N. Carrell Fulbright & Jaworski	St. Joe Paper Co.	morning of Feb. 22, 1979
Nancy M. Higgins	Robert J. Malinak Baker & Botts	Stone Container Corp.	morning of Feb. 22, 1979
Nancy M. Higgins	Thomas G. Slater Hunton & Williams	Chesapeake Corp. of Virginia	morning of Feb. 22, 1979
Nancy M. Higgins	David Bland Barrow, Bland & Rehmet	U.S. Corrugated-Fibre Box Co.	morning of Feb. 22, 1979
Nancy M. Higgins	Thomas P. Hanrahan Kirkland & Ellis; J. Curie Bechtol Foreman, Dyess, Prewett, Rosenberg & Henderson	Willamette Industries, Inc./Western Kraft East, Inc./Corco, Inc.	morning of Feb. 22, 1979
Nancy M. Higgins	Ira Postel Shea, Gould, Climenko, Kramer & Casey	Diamond International, Inc.	afternoon of Feb. 22, 1979
Nancy M. Higgins	Earl E. Pollock Gary Senner Sonnenschein Carlin Nath & Rosenthal	Owens-Illinois, Inc.	afternoon of Feb. 22, 1979; afternoon of Feb. 23, 1979
Nancy M. Higgins	C. Kenneth Shank, Jr. Webster & Sheffield	Olinkraft, Inc.	morning of Feb. 23, 1979
Nancy M. Higgins	Alice Parker Schiff Hardin & Waite	The Continental Group	morning of Feb. 23, 1979
Nancy M. Higgins	Ronald W. Davis White & Case	MacMillan Bloedel, Inc./ MacMillan Bloedel Containers, Inc.	afternoon of Feb. 23, 1979
Nancy M. Higgins	Robert J. Bagdasarian Breed, Abbott & Morgan	Union Camp Corp.	afternoon of Feb. 23, 1979
Shepard Goldfein	John H. Morrison Kirkland & Ellis	Weyerhaeuser Company	afternoon of Feb. 23, 1979

Counsel for Westvaco	Opposing Counsel	Parties	
Shepard Goldfein	William A. Stearns Quarles & Brady	Menasha Corp.	afternoon of Feb. 23, 1979
Nancy M. Higgins	John T. Loughlin Bell, Boyd, Lloyd, Haddad & Burns	Boise Cascade Corp.	morning of Feb. 26, 1979
Nancy M. Higgins	Wayne J. Roper Gibbs, Roper, Loots & Williams	Green Bay Packaging	morning of Feb. 26, 1979
Nancy M. Higgins	Richard M. Clinton Bogle & Gates	Longview Fibre Co.	afternoon of Feb. 26, 1979
Kenneth A. Plevan Nancy M. Higgins	Robert B. Abendroth James W. Greer, Jr. Whyte & Hirschboeck	Champion International, Inc./ Hoerner Waldorf Corp.	afternoon of Feb. 21, 1979, afternoon of Feb. 26, 1979

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

ORDER

Defendant Westvaco Corporation having moved this Court on February 27, 1979 pursuant to Rules 13(g) and 15(a) of the Federal Rules of Civil Procedure for leave to amend its answer and assert a cross-claim for contribution against Defendants Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel,

MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company, Willamette Industries, Inc., John Doe, Inc. and Richard Roe, Inc., in the form annexed to its motion and the Court being of the opinion that justice so requires,

IT IS HEREBY ORDERED that Defendant Westvaco Corporation may amend its answer and assert a cross-claim for contribution against said Defendants in the form attached to its motion.

DONE at Houston, Texas, this day of , 1979.

United States District Judge

[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A. No. H-78-1263)

AMENDED AND SUPPLEMENTAL ANSWER OF DEFENDANT WESTVACO CORPORATION TO THE UNIFIED AND CONSOLIDATED COMPLAINT AND CROSS-CLAIM

Defendant, WESTVACO CORPORATION ("Westvaco"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom, answers the Unified And Consolidated Complaint (the "complaint") herein as follows:

1. Admits that the complaint purports to be a Unified And Consolidated Complaint pursuant to an Order of this Court filed on March 2, 1978 and the Stipulation dated May 16, 1978 and So Ordered on May 31, 1978 and denies knowledge or information sufficient to form a be-

lief as to the truth of the remaining allegations contained in Paragraph 1 of the complaint.

2. Denies each and every allegation contained in Paragraphs 2, 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the complaint.

3. Denies each and every allegation contained in Paragraph 5 of the complaint except admits that the actions identified in Exhibit I to the complaint were transferred to this Court from the districts in which they were commenced pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977 (*In re Corrugated Container Antitrust Litigation*, 442 F. Supp. 921 (Jud. Pan. Mult. Lit. 1977)).

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the complaint except admits that the names listed in Exhibit I to the complaint purport to be the names of plaintiffs in this litigation.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 7 and 9 of the complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the complaint except admits that Westvaco is a Delaware corporation with its principal place of business in New York, New York and is engaged in the business of manufacturing and selling corrugated containers and corrugated sheets in certain geographical areas of the United States.

7. Denies knowledge or information sufficient to form a belief as the truth of allegations contained in Paragraphs 14 and 15 of the complaint and states that the description of the trade and commerce in corrugated containers set forth therein is inaccurate and incomplete.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint, except admits that Westvaco at various times during the period covered by the complaint has sold corrugated containers and corrugated sheets in certain geographical areas of the United States.

FIRST AFFIRMATIVE DEFENSE

9. The complaint fails to state a claim against Westvaco upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. The claims alleged in the complaint against Westvaco are barred in whole or in part by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs lack standing to assert a claim against Westvaco for damages or equitable relief.

FOURTH AFFIRMATIVE DEFENSE

12. The complaint does not allege an appropriate class action and this litigation is not maintainable as a class action.

FIFTH AFFIRMATIVE DEFENSE

13. Plaintiffs are not entitled to invoke the aid of any Court because they are guilty of unclean hands and have acted in bad faith.

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs have been guilty of such laches as to preclude them from invoking the aid of any Court.

SEVENTH AFFIRMATIVE DEFENSE

15. The Court lacks jurisdiction over the person of Westvaco.

EIGHTH AFFIRMATIVE DEFENSE

16. Venue of this cause is improper.

NINTH AFFIRMATIVE DEFENSE

17. By virtue of settlements entered into between plaintiffs and other defendants, plaintiffs have waived that portion of their claims for damages fairly allocable to the settling defendants.

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

18. Each of the corporations named in this paragraph are defendants in the *Corrugated Container Antitrust Litigation*, MDL 310, having been named as defendants in the Consolidated Complaint, and having been named as defendants in one or more of the predecessor complaints in the consolidated actions. Each of these corporate defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio

Name of Defendant	State of Incorporation
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
St. Regis Paper Company	New York
Stone Container Corporation	Illinois
Union Camp Corporation	Virginia
U.S. Corrugated-Fibre Box Company	Indiana
Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

19. The defendant corporations named in paragraph 18 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of action alleged in the complaint which Settlements are being submitted to the Court for approval.

20. John Doe, Inc. and Richard Roe, Inc. are defendant corporations presently unknown to Westvaco which may have entered into proposed settlements of which Westvaco is presently unaware or may in the future enter into proposed settlements similar to those Settlements referred to in Paragraph 19 hereof.

21. Under the terms of the Settlements, plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and

to permit these actions to proceed against all other defendants (Non-Settling Defendants) including Westvaco.

22. With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

23. In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against Westvaco, then Westvaco is entitled to receive appropriate contributions from the Settling Defendants and John Doe Inc. and Richard Roe Inc.

24. By entering into the settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to Westvaco, as alleged in paragraph 23 hereof, in the unlikely event plaintiffs, after trial, should obtain a judgment against Westvaco.

25. Westvaco has previously advised the Settling Defendants that it intends to hold said defendants liable for their appropriate contributions to Westvaco as set forth in this cross-claim.

WHEREFORE, defendant Westvaco Corporation demands:

A. Judgment dismissing plaintiffs' complaint herein with prejudice together with the costs and disbursements of this action including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper; and

B. Judgment against the Settling Defendants, John Doe, Inc. and Richard Roe, Inc. (i) for their respective appropriate contributions to Westvaco in the event there is any liability to plaintiffs by Westvaco, (ii) for costs and disbursements of this cross-claim including reason-

able counsel fees and (iii) for such other and further relief as this Court may deem just and proper.

Dated: February 27, 1979

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
919 Third Avenue
New York, New York 10022
(212) 371-6000

Attorneys for Defendant
Westvaco Corporation

Of Counsel:

Thomas R. Long
Ralph R. Ferney
Westvaco Corporation
299 Park Avenue
New York, New York 10017

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT

CANTRELL AND COCHRANE, INC.
(C.A. No. H-79-87)
DEAN FOOD COMPANY, ET AL.
(C.A. No. H-78-2004)
DRAPER-KING COLE, INC., ET AL.
(C.A. No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A. No. H-78-671)
IOWA BEEF PROCESSORS, INC., ET AL.
(C.A. No. H-78-1263)
ITT CONTINENTAL BAKING CO.
(C.A. No. H-78-376)
SUNMARK, INC.
(C.A. No. H-78-1815)
UNITED FARMERS COOPERATIVE, INC., ET AL.
(C.A. No. H-77-2158)
UNITED FOODS, INC., ET AL.
(C.A. No. H-78-4)

MOTION OF CLASS PLAINTIFFS FOR PRELIMINARY APPROVAL OF SETTLEMENTS

Filed April 16, 1979

Pursuant to Rule 23(3) [sic] of the Federal Rules of Civil Procedure and Section 1.46 of the Manual for Complex Litigation, the class plaintiffs in this litigation respectfully move that this Court grant preliminary approval of each and every proposed settlement currently

on file in this case so that notice of those settlements may be given to class members along with notice of class certification. The grounds for this motion are set forth more fully in the accompanying Memorandum. As that Memorandum shows, each and every settlement is well within the range of possible approval. All those settlements should therefore be conditionally approved.

WHEREFORE, class plaintiffs respectfully pray that their motion be in all respects granted.

Respectfully submitted,

[See Joint Appendix, pages 196-97 for list of counsel]

[Caption Omitted]

MEMORANDUM OF CLASS PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF ALL SETTLEMENTS

NOTE

This Memorandum and the Exhibits refer to or contain copies of documents that are marked "Confidential Pursuant to Court Order in MDL 310, U.S. Dist. Ct., S.D. Tex."

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[Caption and Title Omitted]

Plaintiffs have moved for conditional approval of the twenty-two proposed settlements currently on file in this litigation so that the class notice may refer to those settlements. As this memorandum explains in some detail,* each settlement individually—as well as the group of settlements in the aggregate—is well within the range of possible approval by this Court. For that reason, all settlements currently on file should be preliminarily approved for purposes of notice.

PRELIMINARY STATEMENT

The settlements before the Court for conditional approval total $298,057,370, and represent the largest partial or total settlement amount ever obtained in any class action at any stage of the litigation.** These settle-

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* In paragraph 1 of P.T.O. No. 7, this Court stated that approval of the St. Regis and International Paper Company settlements would require "estimates as to damages [and] probability of success on liability . . ., reliable data establishing the relative ability of settling and non-settling defendants to respond in damages, [an] estimate of fees and costs. [and an] outline of how the settlement fund would be distributed among class members." This memorandum supplies that information, as well as other information, respecting twenty-two proposed settlements. Plaintiffs' expert's estimate as to damages is set forth in Exhibit B. Plaintiffs' estimate as to probability of success on liability is discussed at pp. 26-28, 35-38, *infra*. The relative ability of settling and non-settling defendants to respond in damages, while arguably largely mooted by the achievement of a partial settlement totalling $298.2 million with twenty-two of the thirty-seven defendants, representing 80% of the defendants' share of the relevant market, is addressed in Exhibit C. Plaintiffs' estimate of fees and costs is presented at pp. 45-47, *infra*. The proposed plan of distribution and allocation is treated at pp. 43-45, *infra*.

** Attached hereto as Exhibit A is a chart showing pertinent data as to the terms of each of these settlements. One significant term common to all these settlements is that the

ments were obtained prior to the commencement of depositions, prior to the commencement of the companion criminal trial, and most importantly, prior to the incurring by the class beneficiaries of substantial attorneys' fees and litigation expenses.* The first ten million dollars in settlements were achieved prior to class certification, the next sixty-eight million dollars while such certification was being vigorously challenged in the Court of Appeals, and the remainder—in excess of two hundred million dollars—while there was pending in Congress, with predictions of passage, a bill that would overrule *Hanover Shoe* and *Illinois Brick* and thus substantially jeopardize or limit the rights of the direct purchaser sub-classes to recover any damages from the defendants.

On these grounds alone, it should be beyond peradventure that these settlements are worthy of both conditional and final approval by this Court. But that is not all. The negotiations leading to the proposed settlements were conducted with express court approval, in

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sales of all Settling Defendants remain in the case for the purpose of assessing damages against the Non-Settling Defendants. The Non-Settling Defendants collectively seem quite capable of responding in damages to an amount in excess of what plaintiffs' expert estimates to have been the total overcharge by Settling Defendants during the four-year limitation period. See Exhibit C *infra*, indicating that the Non-Settling Defendants have an aggregate net working capital of $1502.0 million. See Exhibit B, *infra*, setting forth plaintiffs' expert's estimate of overcharges by the Settling Defendants for the four-year period in the range of $185.8 million to $789.0 million.

* All settlement funds are currently drawing interest at the rate of approximately 10% per annum (see Exhibit D) and it is clear that this interest alone will more than cover the attorneys' fees and expenses incurred in the prosecution of this case.

utmost good faith, and at arms' length. The settlements are supported by the vast majority of class plaintiffs—both designated and reserve representatives—and their experienced counsel. In addition, the aggregate settlements represent a healthy percentage of the highest estimate of the overcharges made by Settling Defendants to the class, even though plaintiffs would appear to have been confronting a substantial task in achieving that potential recovery for the class by litigating against the Settling Defendants. Moreover, on top of creating the substantial settlement funds, the settlement agreements on file protect the settling sub-classes against *Illinois Brick* legislation and other adverse contingencies. The settlements are therefore more than fair, adequate and reasonable. They should be preliminarily approved.

STATEMENT

I.

Course Of The Litigation: Chronology

In March, 1977, the first of the class actions that were to become M.D.L. No. 310 were brought.* Thereafter other class actions were filed in the Southern District of Texas, the Northern District of Illinois, and other federal courts in several states. On November 29, 1977, the Judicial Panel on Multidistrict Litigation entered an order consolidating thirty-seven actions as M.D.L. No. 310 in the Southern District of Texas. The complaints in these actions alleged that the defendants and various co-conspirators had engaged in a nationwide conspiracy to fix, raise, maintain, and stabilize the prices of corrugated containers beginning some time before 1960. All

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* *Adams Extract Co., et al* v. *Alton Box Board Co., et al; Douglas Furniture Corp.* v. *Alton Box Board Co., et al.; Wittek Golf Supply Co., Inc.* v. *Alton Box Board Co., et al.*

but one of the thirty-seven cases were class actions. The Panel later transferred other actions to be consolidated as part of M.D.L. No. 310, which presently comprises fifty-two actions against thirty-seven corporate defendants.

In December 1977, this Court constituted Plaintiffs' Steering Committee (P.T.O. No. 2) and ordered the establishment of plaintiffs' and defendants' document depositories (Practice and Procedure Order, Dec. 21, 1977). On February 13, 1978, plaintiffs moved to compel defendants in M.D.L. No. 310 to place in defendants' depository the 1.5 million to 2 million documents that had been produced in response to subpoenas of Houston federal grand jury that had begun an antitrust investigation of the corrugated container industry in December, 1975, and had returned indictments in January 1978 against fourteen of the thirty-seven corporations named as defendants herein. This Court granted that motion on April 14, 1978 (P.T.O. No. 3). Plaintiffs promptly began a coordinated program of inspecting and classifying those documents, which was completed by December, 1978. It should be pointed out that plaintiffs were permitted no discovery before the order of April 14th (See P.T.O. No. 4, Aug. 1, 1977; Practice and Procedure Order, Dec. 21, 1977). In October, 1978, plaintiffs gained access to the Government's trial exhibits. The grand jury documents, the trial exhibits, private investigation, and publicly—available information about the corrugated industry constituted the information base plaintiffs have had to work with.*

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* A series of postponements of merit discovery, necessitated by the criminal proceedings, have occurred. Most significantly, plaintiffs have not been allowed to communicate with government trial witnesses (P.T.O. No. 6, Nov. 16, 1978) nor to take depositions during the period when these settlements were being negotiated and concluded.

In July and August, 1978, plaintiffs reached settlement agreements with defendants St. Regis Paper Company ($1,700,000) and International Paper Company ($8,300,000).

On September 6, 1978, this Court certified a class of plaintiffs consisting of "all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978." Thereafter, on December 26, 1978, P.T.O. No. 7 carved out of the original class a "Sheet Plant Sub-class." On December 29, 1978, the Court of Appeals for the Fifth Circuit denied defendants leave to file a petition for a writ of mandamus directed to the class certification order of September 6, 1978.

By December, 1978, most of the corporate and individual defendants in the criminal case had entered nolo contendere pleas and been sentenced. The criminal trial against the remaining two corporations and seven individuals was scheduled to begin on January 15, 1979. During December and January, before the criminal trial began, plaintiffs concluded separately negotiated settlement agreements with twenty of the M.D.L. No. 310 defendants. Ten of these defendants had not been criminally indicted. Settlements with these unindicted defendants aggregated $51,568,870. The five defendants indicted for misdemeanors settled for a total of $105,738,500. The five felony defendants settled for a total of $130,750,000. Settlements achieved in December and January totaled $288,057,370.

Hence, by the time the criminal trial began on January 22, 1979, plaintiffs had settled with twenty-two of the thirty-seven defendants in M.D.L. No. 310 for a total of

$298,057,370.* Each settlement agreement was negotiated and concluded with the defendant on an individual basis. The settling defendants in the aggregate account for approximately 80% of the defendants' share of the relevant market. On the basis of their intensive review of more than 1.5 million grand jury documents, the Government's trial exhibits, industry studies by Arthur Anderson & Co. and the Fibre Box Association, informal investigations, consultations with their experts as to provable overcharges, and their collective experience in similar and related antitrust cases, plaintiffs' counsel had a sound working knowledge of their case as these settlement agreements were being reached. However, it is important to note that the settlements were obtained before the commencement of depositions, before the criminal trial began, and before the class beneficiaries had incurred substantial attorneys' fees and litigation expenses.

II.

History Of Settlement Negotiations

A. *Pre-Certification Settlements*

The history of the pre-certification settlements with St. Regis and International Paper ("IP") has already been set forth in the papers previously filed with this Court in support of such settlements.** After the St. Regis

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* While the following approach was not used in calculating the settlement value of this case, it is interesting that the $298.1 million settlements total represents 34.9 of the Settling Defendants' aggregate net pre-tax profits for the years 1973-76, inclusive. These are the years within the four-year statute of limitations period. See Exhibit B, Table 1, *infra*.

** Recently, when it became apparent that the expense of preparing a class notice list and giving notice to the class would be substantial and that notice of settlements would

settlement became public, plaintiffs were contacted by a number of indicted and unindicted defendants regarding the possibility of settlement, but none of these tentative overtures produced concrete offers substantially better than the Four Hundred Twenty-Eight Thousand ($428,000) Dollar per percentage point of defendants' share of the market paid by St. Regis.* In an effort to develop a strategy to break this logjam and determine a consistent pre-certification settlement value for the entire case, the Plaintiffs' Steering Committee held a meeting in New York City on August 9, 1978. The Steering Committee received a report on plaintiffs' review of the grand jury documents, the Government's recently filed Bill of Particulars, the history of settlement overtures, the possible impact of the Fifth Circuit's recent *Blue Bird* opinion, and the recommendation of the Plain-

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likely be included in the first notice to the class, plaintiffs asked St. Regis and IP whether they would agree to amend their settlements to provide that up to $400,000 of their settlement funds could be used, upon preliminary approval of the same, to defray these expenses. They have so agreed and an amendment to their settlement agreements is filed herewith. Plaintiffs now seek approval of their settlements as amended. This amendment obviously is of substantial value to the class.

* Plaintiffs were approached very early by Diamond and Dura, but the market shares of each were so small that the settlement amounts they were discussing could be regarded as "nuisance values" and would not, it was felt, have any impact on the other defendants. Plaintiffs were also approached during June and July by Mead, Boise-Cascade, International Paper and Champion. Mead unequivocally rejected the notion of paying substantially more than St. Regis. On June 10th, Boise offered $390 thousand per point, and on July 11th, IP indicated a willingness to pay $600 thousand per point and perhaps something more. No figures were mentioned during casual conversations with Champion's counsel.

tiffs' Ad Hoc Settlement Committee (hereinafter "AHSC"), which had available to it certain tentative damage projections by plaintiffs' economist, Dr. Richard Hoyt,* and by one of defendant's economists.** Some of the members of the Steering Committee thought the entire case had a pre-certification value of $100 million; others thought that value was at least $300 million; all agreed that something had to be done with at least one major indicted defendant to break the ice and that it was quite appropriate to offer a substantial discount to the first such defendant to do so. The highest offer plaintiffs had received from such a defendant was at the level of $800 thousand per point.*** After considerable debate, the Steering Committee unanimously agreed to consummate a settlement at the level of $1 million per percentage point of defendants' share of the market with one major indicted defendant.**** The Steering Committee

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* Dr. Hoyt, who became familiar with the case by virtue of his work on the class action issues, had been asked in July, by the Chairman and Vice-Chairman of Plaintiffs' Steering Committee, to commence estimating the possible magnitude of the alleged overcharges.

** On June 10, 1978, and again on August 9, 1978, members of the AHSC met with counsel for Boise-Cascade and an independent economist, who had done certain damage studies on its behalf, to discuss possible settlement. The economist explained his methodology in arriving at a maximum overcharge of around $170 million for the four-year period prior to suit.

*** The offer came from Boise-Cascade on the morning of the Steering Committee meeting.

**** The Steering Committee also agreed that IP was a logical candidate. First, it had already indicated a willingness to pay more than $600 thousand per point. Second, its substantial market share would make the total amount of the settlement a figure that would more likely have an impact on

also resolved that all further pre-certification settlements would be at the level of $3 million per point for indicted defendants and $2 million per point for unindicted defendants.

From August 14th through August 25th, the AHSC was involved in continuous negotiations with counsel for IP over the terms of the IP agreement, the amount of which had been agreed to on August 11th.* On August

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the remaining defendants, many of whom were taking a wholly unrealistic view of the settlement value of the case. Third, as a felony indictee, I.P. had been charged with violations during the entire damage period and, therefore, securing its commitment to cooperate in providing documents and information would be more valuable than securing a similar commitment from either an unindicted defendant or from a misdemeanor-indicted defendant not alleged by the Government to have been involved in illegal conduct after December 21, 1974. The last two considerations, made Boise-Cascade a less worthy candidate for receipt of the one threshold settlement the Steering Committee was prepared to offer.

* One initial hurdle in the negotiation of the IP agreement was the calculation of the settlement amount. Using IP's average share of total industry shipments in board feet for 1972-1976, as reported in the Fibre Box Association publications, plaintiffs calculated that IP's shipments in feet accounted for 5.97% of all shipments in feet. (Sales figures in dollars for other defendants and non-defendant FBA members were unavailable.) IP agreed with this calculation, but disagreed with plaintiffs' calculation of IP's share of the defendants' share of the market. During negotiations with St. Regis, plaintiffs had been shown documents indicating that defendants accounted for 72% of the entire market and had therefore calculated each defendant's share of defendants' portion of the market by dividing that defendant's share of the entire market by .72: *e.g.*, in IP's case, 5.97% ÷ .72 = 8.3%. Counsel for IP pointed out that plaintiffs had failed to include shipments by some defendants in the defendants'

15th, counsel for Container Corporation ("CCA") met with representatives of the AHSC in Houston and indicated that CCA might be willing to meet the IP offer of $1 million per point. CCA rejected out of hand plaintiffs' suggestion that it pay $3 million per point.*

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market share and that the defendants' true share of the entire market was in fact 77%, with IP accounting for 7.75% of that amount (5.97% ÷ .77). While plaintiffs recognized that IP's posture was not without merit, they also sought to maximize the settlement and insisted that their $1 million per point offer be applied to their 8.3% calculation. IP agreed, but only upon the condition that for purposes of future settlements, plaintiffs would continue to calculate defendants' share of the market at 72%. Plaintiffs agreed, and accordingly have calculated all other settling defendants' market shares by dividing their shares of the total market by .72. While this has had the effect of treating all defendants alike in assessing relationships to each other in terms of shipments, it has also had the effect of understating what each settling defendant has paid per point. For example, Exhibit A reflects that Weyerhauser accounted for 7.83% of defendants' share of the market and paid $5 million per point, while in fact Weyerhauser accounted for 7.32% of defendants' share of the market and paid $5.348 million per point.

* In so doing, not only did counsel for CCA recite the standard arguments advanced by defendants in opposition to certification, but he also emphasized: (1) the CCA employees named by the Government as co-conspirators were all plant-level employees with local responsibilities only; (2) unlike IP, CCA was a misdemeanor indictee and, given the prominent role CCA had played in *United States* v. *Container Corporation*, the Government would certainly have indicted it for a felony had there been any hint of post-1974 involvement; (3) having been the named defendant in the earlier civil case, CCA's limitations defense would be difficult to overcome by claims of fraudulent concealment.

B. *The Post-Certification Stalemate*

On September 6, 1978, the Court filed its class certification order. On September 8th and 12th, counsel for Willamette, Continental Group and Diamond called the Chairman of Plaintiffs' Steering Committee, Mr. Susman, to explore settlement. In each case, Mr. Susman informed counsel that the authority of the AHSC to settle at the $3 million indicted/$2 million unindicted level had expired with class certification and that the Steering Committee was scheduled to meet on September 19th to revise its settlement guidelines. At that meeting, after considerable debate,* the Steering Committee unanimously

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* In addition to the usual reasons given for increasing settlement demands after certification, there were several additional factors that caused the Steering Committee to consider the agreed-upon increase warranted. First, plaintiffs were beginning to hear about the amounts at which settlements were being discussed and negotiated by some of the same defendants in the *Folding Cartons* case, involving a smaller amount of commerce than the corrugated industry. Second, the criminal trial was then scheduled to commence in a matter of weeks, and plaintiffs believed this might put additional pressure on defendants to settle. Finally, the members of the Steering Committee were divided in their evaluation of the realistic value of the case and yet all agreed that at that time unanimity was essential on matters of settlement. At the same time, the Steering Committee felt it would be irresponsible to take the position that no amount of money would then be acceptable in settlement. If anything, the guidelines adopted on Sept. 19th were an effort to set a value on the case that would satisfy even the most bullish members of the Steering Committee: few had any hope that settlement could be achieved at these "show-stopping" levels, and many were content to discourage all further settlements until more could be learned.

agreed to raise the post-certification guidelines to $5/$3 million per point.*

From September 19 through December 5, various defendants (Continental Group, Diamond, Dura, Weyerhaeuser, Union Camp, CCA, Owens-Illinois and PCA) contacted Mr. Susman regarding settlement possibilities. Mr. Susman informed them of the settlement guidelines adopted by the Steering Committee on September 19th, but indicated that the plaintiffs might entertain offers lower than those guidelines as long as they were substantially better than the IP formula. He also reiterated the obvious: plaintiffs were prepared to give consideration for reduced settlement rates per percentage point to earlier settlers. These defendants, characterizing plaintiffs' demands as preposterous, uniformly refused to come forward with such offers, and some (Continental Group on October 3, and Owens-Illinois and Weyerhaeuser on October 13) actually wrote Mr. Susman suggesting that they would be willing to settle only at the IP level of $1 million per point. If the plaintiffs could not then see the writing on the wall, the indicted defendants' united course of action became perfectly clear when counsel for Inland Container, on December 6, 1978, just a week before the scheduled hearing to determine whether the IP and St. Regis settlements should be preliminarily approved, wrote the Court, on behalf of all indicted defendants, requesting an off-the-record in chambers conference to explore the possibility of a group settlement using the IP formula as a benchmark.

On December 5, the day before plaintiffs received the letter from counsel for Inland, counsel for Dura, Diamond, PCA and Weyerhaeuser contacted Mr. Susman to

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* It should be noted that the post-certification settlements to date average $4.88 million per point for indicted defendants and $2.74 million per point for unindicted defendants.

explore the possibility of settlement. Mr. Susman responded that he was still bound by the Steering Committee's guidelines adopted in September, but that he would check further with the Steering Committee to determine whether there was any desire on its part to depart from these guidelines in view of the recent filing with the Fifth Circuit of a Petition for Writ of Mandamus directed to this Court's class certification decision. A Steering Committee conference call was held at midday on the 5th to explore this possibility, but the Steering Committee determined to make no departures from its settlement demands until after it could meet on January 9th to fully review the narrative reports that were then being prepared by each of plaintiffs' discovery subcommittees based upon their review of each defendant's grand jury documents. Plaintiffs' counsel also needed time to complete their evaluation of the information contained in the Government's trial exhibits for the criminal trial, which had been obtained in mid-October. Immediately after this Steering Committee conference call was concluded, Mr. Susman received a call from counsel for Union Camp requesting a meeting to explore settlement. At first, counsel for Union Camp raised the possibility of a group settlement with the unindicted defendants. Mr. Susman reiterated the Steering Committee's demand of $3 million dollars per point, expressed doubt that any group negotiations would be fruitful at that level, but stated that an offer from a single unindicted defendant in excess of the $1 million per point paid by IP might get the attention of at least some members of the Steering Committee. The next day (the same day the letter from counsel for Inland was received), counsel for Union Camp met with Mr. Susman and an associate in Houston to discuss the matter further. During that meeting, counsel for Union Camp stated that while he had no authority to offer even $1 million per point, he might consider recommending that amount to his client in view

of the fact that Union Camp was about to conclude a year of profitable operations and therefore its management was anxious to dispose of the case during 1978 if at all. He also argued that plaintiffs demands were so high that a stalemate was created and that if it continued, the unindicted defendants would be forced to band together as a group in the same way that the indicted ones had apparently done. At the conclusion of the meeting, Mr. Susman stated he would again raise the matter with the Steering Committee.

C. *The Union Camp Ice-Breaker*

On December 7, members of the Steering Committee held another conference call. During that call, the Steering Committee determined to proceed with negotiations with Union Camp at a substantial multiple of the St. Regis settlement.* Not only was the Steering Committee concerned about the pending Petition for Writ of Mandamus and the threat of *Illinois Brick* legislation during the session of Congress beginning in January, but the Steering Committee was particularly concerned about the indicted defendants' announced effort to pressure plaintiffs into a settlement with them at the IP benchmark. Furthermore, by virtue of comments made by counsel for Union Camp, plaintiffs feared that the unindicted defendants were being pressured by the existing stalemate to coalesce into a negotiating group that might virtually halt further individual settlements. It was felt that a settlement with an unindicted defendant at a level four to five times greater than the St. Regis pre-certification settlement would readily establish the magnitude of the pre-certification discount and provide the plaintiffs with a new benchmark to be used for both indicted and unindicted defendants in post-certification settlements.

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* St. Regis settled for $428 thousand per point.

Immediately after the Steering Committee conference call, Mr. Susman called counsel for Union Camp and stated that the Steering Committee was willing to settle with Union Camp for $2 million per point. Mr. Susman further stated that if counsel for Union Camp had present authority to offer $1 million point, there was possibly some opportunity for fruitful negotiation. Counsel for Union Camp indicated that he had such authority and accordingly on December 10, counsel for Union Camp and members of the AHSC (plus the plaintiffs' principal discovery attorney for Union Camp) met in Houston and for the next three days were engaged in continuous negotiations over terms of a settlement agreement. That negotiation, which included a rather frank discussion of particular references to Union Camp in the grand jury documents, resulted in Union Camp's agreement to pay $2 million per point or almost five times the amount that St. Regis, also an unindicted defendant, had paid.* Since plaintiffs were acutely aware that the Union Camp agreement would set a model for post-certification settlements, virtually every clause thereof was subject to strenuous negotiation, particularly since Union Camp, having paid twice the amount per point as IP, an indicted defendant, initially asked for provisions at least as favorable as those contained in the IP settlement agreement. Plaintiffs were particularly concerned about five areas of initial disagreement. First, plaintiffs insisted that Union Camp's sales

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* During the negotiations with Union Camp, plaintiffs discovered that Union Camp had a wholly-owned subsidiary, Allied Container Corporation, that manufactured corrugated containers and sheets and that reported its shipments separately to the FBA. Though Allied had not been named as a defendant, plaintiffs insisted that its market share be added to Union Camp's in calculating the settlement amount. This resulted in the payment of an increased amount by Union Camp and also set a precedent for subsequent settlements.

not be removed from the case so that the remaining defendants would be jointly and severally liable for any overcharges attributable thereto, less only the amount paid by Union Camp in settlement. Second, plaintiffs were unwilling to give Union Camp an option to terminate the agreement in the event that *Illinois Brick* legislation were to be enacted during the coming year.* Third, in light of the pending petition for Writ of Mandamus, plaintiffs were insistent that the Union Camp settlement not be conditioned on the continued vitality of this Court's class certification decision. Fourth, plaintiffs were unwilling to accord to Union Camp the right, accorded to St. Regis and IP, to terminate the settlement if it were dissatisfied with the magnitude of opt-outs.** Finally, plaintiffs were unwilling to accord to Union Camp a blanket "most-favored nations" provision that would have prevented plaintiffs from ever settling with

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* Considerable time was spent in negotiating paragraph 14 of the Union Camp agreement in order to avoid the consequences to plaintiffs of the IP-type *Illinois Brick* termination provision and yet give Union Camp some protection in the event legislation conferred standing on indirect purchasers, a class of such purchasers was certified, and the Court deemed it proper to allocate a certain portion of the settlement fund to such class.

** Paragraph 13 of the Union Camp agreement was the result of many hours of negotiation and became the model for future settlements, except that in future agreements plaintiffs insisted on and obtained higher opt-out percentages. From the plaintiffs' standpoint, the crucial feature of paragraph 13 was that it required not only a certain level of opt-outs but also a certain level of suits actually filed by opt-outs in order for the settling defendant to have the right to terminate. From experience in other cases, plaintiffs anticipated a certain amount of opt-outs, but felt that very few of the opt-out purchasers would actually go so far as to file suit.

other defendants on more favorable terms.* Plaintiffs overcame Union Camp's initial objections to all of these points, and on December 12th, an agreement was concluded to the satisfaction of plaintiffs on each of them.**

D. *The Fall-Out From The Union Camp Settlement*

On December 13th, the Court held an off-the-record conference with counsel for plaintiffs and counsel for the

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* Paragraph 16 of the Union Camp agreement (that also became a standard clause in the subsequent settlements) was carefully designed (a) to give the Union Camp's counsel the assurance that he would not be embarrassed by closely contemporaneous settlements more favorable to other defendants, similarly situated, simply because their attorneys were better negotiators and, at the same time, (b) to leave plaintiffs the freedom to recognize legitimate differences among defendants (as to culpability and the ability to pay) and material events (including factual revelations and changes in applicable law) that might unfold and affect the prospects of recovery as both the criminal and civil proceedings progressed. Paragraph 16 was carefully designed to avoid those criticisms that the *Manual for Complex Litigation*, pp. 62-64, directs at the usual "most-favored nations" clause.

** The only extent to which the Union Camp agreement is more favorable to defendant than was the IP agreement is in the provisions for discovery cooperation (see ¶ 15 of both agreements). While the plaintiffs insisted upon more cooperation than Union Camp was initially ready to agree to, plaintiffs were willing to relieve Union Camp of some of the obligations imposed on IP. First, it was by then not totally clear what materials the Court would allow IP to turn over to the plaintiffs in view of the strenuous objections of the non-settling defendants to paragraph 15 of the IP agreement. Second, plaintiffs did not anticipate that Union Camp, as an unindicted defendant, would have available any investigative materials that could not be obtained, with court approval, from IP.

indicted defendants in response to the request of counsel for Inland and over the strenuous objections of plaintiffs. During the course of that conference, a spokesman for the indicted defendants stated that what was fair for IP was fair for the remaining indicted defendants, that they wanted to negotiate as a group, but that they would not pay even $2 million per point. In response, counsel for plaintiffs disclosed that plaintiffs had recently concluded a settlement with an *unindicted* defendant at that very level. Plaintiffs suspect that it was that announcement, that caused a number of defendants to commence serious settlement negotiations with plaintiffs.

Commencing immediately after the December 13 of-the-record conference,* plaintiffs' counsel met on that afternoon with counsel for CCA, Champion, and one representative who purported to speak on behalf of a group of virtually all unindicted defendants. Remembering the warning of counsel for Union Camp, plaintiffs' counsel were most concerned about the fact that the unindicted defendants had apparently coalesced into a negotiating group. And when the spokesman for the unindicted defendants offered a package amount that would have resulted in the unindicted defendants paying less than the $2 million dollars per point already agreed to by Union Camp, it became obvious to plaintiffs that they should disclose to these defendants two pertinent facts: (1) that Plaintiffs' Steering Committee had ranked each unindicted defendant in terms of culpability and

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* The Court did make several statements that guided plaintiffs in formulating their subsequent settlement demands: (1) the plaintiffs must strive for the maximum dollar recovery at minimum expense; (2) as the litigation progresses, the expenses to the class increase and settlement amounts have to go up too; (3) the Court, in approving settlements, will look at the net dollars to the class and not the net dollars to plaintiffs' attorneys.

had set a price tag for each at between $2 million dollars and $4 million dollars per point; and (2) that, as in the past, the earlier settlers would be given some discount over the later ones. After another unsuccessful meeting with a spokesman for the unindicted defendant group on December 14th, the group effort apparently collapsed and that afternoon plaintiffs' counsel met separately with counsel for Diamond, Dura, Chesapeake, and Longview, respectively. At that time, settlements were negotiated with Dura and Diamond at the $2 million dollar per point level (*i.e.*, with no increase from the Union Camp level) primarily because of their small market shares. In addition, both had seriously discussed settlement prior to certification, and both were willing to forego any *Illinois Brick* or opt-out protection.*

On December 16th, the Plaintiffs' Steering Committee again held a conference call to review the events of the last several days. While the Steering Committee would have preferred more time for careful deliberation and greater availability of hard economic data, the amounts being offered by defendants were clearly approaching the range of the guidelines set by the Steering Committee in September, and the Steering Committee was mindful not only of the pending mandamus petition, but also of this Court's admonition, on December 13th, that the class representatives should keep firmly in mind not only

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* At the same time, plaintiffs' counsel met with counsel for Interstate. Unlike the other unindicted defendants, Interstate stated it lacked the resources to pay what plaintiffs were demanding. Similar claims of hardship have been made by Consolidated Packaging and Alton. With the co-operation of each, independent accounting firms employed by plaintiffs have evaluated these claims through review of requested financial information and interviews with management. The results of such evaluations are now being considered by Plaintiffs' Steering Committee.

the dollars involved in settlements but the expense to the class through years of litigation in producing such dollars.* After full consideration of all these other factors, the Steering Committee approved pursuing settlement negotiations with unindicted defendants in amounts ranging from $2.4 million dollars to $4 million dollars per point. It was also agreed that some effort should be made to break up the logjam that would be created if the indicted defendants continued to insist on group negotiations at the levels that counsel for Inland had insisted upon on December 13th (less than $2 million dollars per point).** For the first time, plaintiffs decided to differentiate between those defendants indicted for misdemeanors and those indicted for felonies and to seek $4 million per point from misdemeanor defendants and $5 million per point from felony defendants. It was also decided that, to break up the group effort, the first post-certification settling misdemeanor defendant should be offered $3.5 million per point and the first post-certification settling felony defendant, $4.5 million per point. Finally, it was decided to extend these offers to Boise-Cascade and Champion, respectively, since they had been the first de-

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* Plaintiffs were also keenly aware that the Westvaco motion to file cross-claims for contribution against IP and St. Regis (filed on Dec. 11, 1978) would, if granted, have a devastating effect on plaintiffs' ability to settle with individual defendants in the future, particularly if plaintiffs continued to insist that the settling defendants' sales not be removed from the damage universe. On December 14th, counsel for Inland, pointing to the fact that the issue of contribution was pending in three courts of appeals, argued the necessity to remove the St. Regis and IP sales from the case as a condition to approval of those settlements.

** On December 14th, the spokesman for the indicted defendants wrote plaintiffs requesting an early meeting to explore the possibility of a group settlement.

fendants in each category to seriously discuss settlement with plaintiffs.

During the week of December 18th, settlements were negotiated with several unindicted defendants: Chesapeake (at $2.4 million per point), Longview (at $2.5 million per point), Willamette (at $2.7 million per point), and Menasha (at $2.75 million per point). Boise-Cascade, a misdemeanor indictee, settled at $3.5 million dollars per point, and Champion, a felony indictee, at $4.5 million dollars per point. During the same period, plaintiffs received further overtures from counsel for CCA and counsel for Weyerhaeuser.

In order to be better able to evaluate these overtures as well as any offers that might be made by the indicted-defendant group, plaintiffs' counsel met on December 17th through the 20th with two economists: Dr. Richard Hoyt, who had previously worked on damage estimates, and Professor Jeffrey Harrison, a Ph.D. economist with the University of Houston School of Law, who was retained at that time to assist Dr. Hoyt. In an effort to further refine an estimate of potential actual damages, these economists were instructed to have a report ready for Plaintiffs' Steering Committee when it met on January 5th to set further settlement guidelines.

E. *The Post-January 5th Settlements On Behalf of the Container Purchaser Sub-Class*

All settlements before Christmas had been negotiated on behalf of the entire class of purchasers of corrugated containers and sheets that had been certified by the Court in early September. While Great Northern Packaging had filed a motion to create a Sheet Plant sub-class, the Court did not take any formal action on this motion until December 26th. Therefore, all pre-Christmas settlements were negotiated with the full consent and participation of counsel for Atlas Container (the only sheet

plant among the then designated class representatives) on behalf of both container purchasers and sheet plants. The overall amounts seemed well within the range of reasonableness, and the Steering Committee and the designated class representatives recognized that they would later have to work out an allocation formula between any sub-classes the Court might create. A majority of the class representatives, including Atlas Container, and a majority of the members of the Steering Committee also felt it was entirely proper to conduct joint negotiations on behalf of the entire class, at least until such time as the Court might formally create a Sheet Plant sub-class with additional class representatives. On December 26th, the Court entered an order creating such a sub-class and designating Atlas Container Co., Inc. (represented by Mr. Montague) and Great Northern Packaging Corp. (represented by Mr. Hartunian) as representatives of that sub-class.

From December 26th to January 5th, plaintiffs declared a moratorium on settlement negotiations and so informed the defendants who were inquiring about the possibility of settlement. Plaintiffs needed time to discuss possible allocation problems with the Sheet Plant sub-class representatives and to conduct a full Steering Committee meeting devoted to the question of settlement. Plaintiffs informed counsel for CCA and counsel for Weyerhaeuser that plaintiffs would meet with them to discuss settlement on January 6th after the meeting of the Steering Committee on January 5th. Plaintiffs also informed counsel for Inland that they would meet with the indicted defendants as a group on January 9th.

On January 4th, the members of the AHSC met with Professor Harrison and Dr. Hoyt to discuss their preliminary damage estimates. The actual damages then estimated by plaintiffs' experts during the four-year period preceding the filing of these lawsuits were $733

million.* Members of the AHSC also calculated that if all defendants had uniformly inflated the price of corrugated containers and sheets 4% across the board (and plaintiffs' counsel doubted it could have been more in view of the nature of the industry and counsel's experience in similar cases), the actual overcharge to *all* customers for a four-year period before filing the suit would have amounted to $490 million. All these calculations and the liability evidence as to each defendant were thoroughly discussed at the Steering Committee meeting on January 5th, and the Steering Committee, at the conclusion, set settlement demands for each remaining defendant. If complied with, plaintiffs anticipated these demands would produce a total recovery for the class of approximately $363 million.**

At the Steering Committee meeting on January 5th, there was also some attempt to determine a fair allocation formula between the two sub-classes, but nothing definite was decided. Messrs. Montague and Hartunian expressed the view that it would be inappropriate to proceed with joint negotiations until the Sheet Plant subclass could determine the amount it wanted to obtain in settlement from each remaining defendant. A majority of the Steering Committee and a majority of the designated representatives of the Container Purchaser subclass agreed that neither the Steering Committee nor the Container Purchaser representatives could continue to

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* This figure involved all sales of all corrugated products by all defendants to all customers; it did not exclude those sales to the large customers who had already filed their own individual lawsuits and would thus probably not elect to participate in any class settlement.

** Plaintiffs were acutely aware that such a fund, banked at this time, would at current interest rates grow to almost $440 million within two years, the period of time it would probably take to prepare this case for trial.

negotiate on behalf of the Sheet Plant sub-class. They also felt very strongly that negotiations should proceed on behalf of the Container Purchaser sub-class alone. In the first place, commitments had already been made to a number of defendants to meet with them on January 6th and 9th. In the second place, the criminal trial was scheduled to begin on January 15th, and plaintiffs perceived this as putting considerable pressure on the defendants to settle.

Accordingly, on January 6th, various members of Plaintiffs' Steering Committee met with counsel for CCA and counsel for Weyerhaeuser to negotiate settlements on behalf of the Container Purchaser sub-class only. Since counsel for each of these defendants came to Houston knowing that misdemeanor and felony defendants had recently settled claims by both the Container Purchaser and Sheet Plant sub-classes for $3.5 and $4.5 million per point, respectively, they were dismayed to learn that the plaintiffs' representatives disclaimed any authority to settle for the Sheet Plant sub-class and demanded from them $4.0 and $5.0 million per point, respectively, in settlement of the claims of just the Container Purchaser sub-class. Indeed, it seemed that this would be an impossible obstacle to further negotiations. At first, counsel for CCA and Weyerhaeuser demanded a discount for the fact that they were obviously not going to be able to settle the entire case. The representatives of the Container Purchaser sub-class were unwilling to grant this discount. After considerable negotiations, plaintiffs compromised by offering to earmark a portion of the settlement funds for possible, but not necessary, allocation to the sheet plants upon application of that sub-class and approval by the Court. CCA and Weyerhaeuser agreed to the demands made by the Container Purchaser representatives and settlements with these defendants were agreed upon. The Container Purchaser

sub-class did not purport to settle any claims of the Sheet Plant sub-class and retained the freedom to contest any claims by the Sheet Plant sub-class to that portion of the settlement fund that in theory could be allocated by the Court to it.

On January 9th, counsel for the remaining indicted defendants (excluding Consolidated Packaging) met with representatives of the Container Purchaser sub-class to explore the possibility of a group settlement. Plaintiffs' counsel explained that plaintiffs' economists had been working on the matter for several weeks and that in view of their estimates of possible damages, plaintiffs had to obtain more than $150 million dollars in the aggregate from the eight indicted defendants present. The defendants made no offer on the 9th, but six of them (excluding Alton and Mead) returned the next day to offer plaintiffs $85 million dollars as a package deal. Plaintiffs replied that plaintiffs had to obtain $131 million dollars from the group of six in order to meet their projected total for the entire case. Defendants rejected this demand in the strongest of terms.

The same day, January 10th, plaintiffs had commenced negotiations of a settlement with McMillan-Bloedel. While counsel for McMillan-Bloedel initially sought to have his client treated the same as the last settling unindicted defendant, Menasha, which had paid $2.75 million per point, counsel for plaintiffs insisted that, based upon the number of trial witnesses and co-conspirators identified by the Government as being present or former employees of McMillan-Bloedel and upon references to McMillan-Bloedel in the grand jury documents, it should not be treated any more favorably than a defendant indicted for a misdemeanor. Since a settlement had just been completed with CCA at $4 million per point, plain-

tiffs demanded and obtained $4 million per point from McMillan-Bloedel.*

On January 11th, the group efforts of the indicted defendants collapsed in the same manner that the group efforts of the unindicted defendants had collapsed on December 14. Mr. Susman was contacted by counsel for Owens-Illinois and counsel for Olinkraft seeking meetings to discuss individual settlements. Settlements were concluded with both of these felony-indicted defendants at $6 million per point during negotiations in Houston the next day. On January 16th, settlement negotiations were commenced with the Continental Group and within several days, it had agreed to settle for $6.5 million per point. On January 18th, settlements were agreed to with the three remaining misdemeanor defendants, St. Joe, Stone, and Inland, at the level of $4.75 million per point. Thus individual settlements with each of the six members of the indicted defendant group produced a total of $129 million, only $2 million short of what plaintiffs had demanded of the entire group on January 9th and $44 million more than the group had offered at that time.

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* The McMillan-Bloedel settlement demonstrates the wisdom of the two key concepts of plaintiffs' settlement strategy: (1) individualization and (2) enhancement. By avoiding group settlements, plaintiffs were able to use the grand jury documents and Government trial exhibits to assess culpability of each defendant on an individual basis and thus recover more than would have been the case had the defendants settled as a group on some pro rata basis acceptable to the least culpable defendant in the group. By letting the defendants know that early settlers would be given credit for breaking the ice and for creating an interest-bearing bird-in-the-hand and that later settlers, though of equal culpability, would have to pay enhanced amounts to cover plaintiffs' loss of interest and expense of further litigation, plaintiffs were able to maximize recovery by providing defendants with the incentive to settle quickly.

It also resulted in these indicted defendants paying an average of $5.4 million per point compared to the $5 million per point maximum that plaintiffs had demanded from them from September 19 through December 1978.*

III.

The Criminal Trial

The Houston grand jury antitrust investigation of the corrugated industry that began in December, 1975, culminated in indictments, returned on January 25, 1978, against fourteen corporations and twenty-six individuals. The indictments charged defendants with participation in a conspiracy to fix, raise, maintain, and stabilize the prices of corrugated containers and corrugated sheets throughout the continental United States east of the Rocky Mountains. The conspiracy, an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, allegedly began some time before 1960. The nine corporations and nine individuals indicted for felonies were charged with participating in the conspiracy until the date the indictments were returned. The five corporations and seventeen individuals indicted for misdemeanors were charged with participation in the conspiracy until some time before December 21, 1974.

The criminal trial against the two corporations and seven individuals who had not entered nolo contendere pleas began on January 22, 1979. Plaintiffs' Steering Committee arranged that one of plaintiffs' counsel be in daily attendance to monitor. On the basis of daily monitors' written reports and the daily transcripts, plaintiffs

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* During January 1979, settlements were also concluded with unindicted defendants U.S. Corrugated and Green Bay Packaging at $4 million and $3.25 million per point, respectively.

offer the following brief description of the evidence developed to date. Obviously, this Court is uniquely able to assess the impact of the criminal trial on the M.D.L. No. 310 plaintiffs' potential case. The following description is intended only to sketch plaintiffs' perspective.

The Government's case depended upon showing the existence of a single industry-wide price-fixing conspiracy in effect east of the Rocky Mountains. The key elements the Government sought to prove were: (1) frequent exchanges of price information between competitors; (2) a common understanding that prices thus exchanged would be honored; (3) a common purpose of producing anticompetitive effects. The Government indicated that it would not seek to show that anticompetitive effects were actually produced. (Government's Pre-Trial Brief, Jan. 17, 1979, p. 13.)

On March 14, 1979, the Government concluded its presentation in chief, having called thirty-two witnesses. These witnesses persuasively established that a very large number of exchanges of price information between competitors had occurred. There was very substantial evidence that, particularly within local market areas, prices were exchanged on the understanding, perhaps not explicitly stated but nevertheless clearly present, that competitors would honor each other's prices. Further, the Government presented some evidence showing that the understandings as to exchanging price information and honoring competitor's prices existed above the local market area level and suggesting the existence of an industry-wide conspiracy. On the other hand, some of the evidence points up the inevitable uncertainties facing plaintiffs' in litigation of this type. For example, there were indications in the testimony that each corrugated container market area is a separate competitive entity, not dependent upon other local market areas for the success of its pricing activities. Further, a key witness,

(David Marshall), whose evidence might have gone far toward connecting the alleged local market understandings into some kind of industry-wide scheme, may have developed credibility problems. (See Tr. Vol. 24, pp. 58-60.)

Plaintiffs feel that the evidence now available sharply supports the viability of their case. The evidence developed in the criminal trial will be a great assistance to plaintiffs' counsel. Of course, during the period when the instant settlement agreements were being negotiated and achieved, plaintiffs' had less information than is now available. The grand jury documents were helpful in educating plaintiffs' counsel as to the nature of the corrugated industry and the probable elements of the price-fixing conspiracy, but they did not afford any great amount of direct evidence of explicit conspiratorial contact. In October, 1978, plaintiffs obtained the Government's trial exhibits, including the centrally-important Marshall documents. These documents materially assisted plaintiffs' counsel in their settlement deliberations and negotiations. However, there was some doubt about the exact nature, degree of credibility, and, most significantly, admissibility of this data. Plaintiffs' counsel believed that, as to each settlement agreement concluded, the information then available strongly indicated adequacy, fairness, and reasonableness. The evidence produced by the criminal trial, while adding appreciably to the strength of plaintiffs' case, does not so overpoweringly rule out the contingencies inevitably present in a case like M.D.L. No. 310 as to suggest that it should not have been partially settled for nearly three hundred million dollars.

ARGUMENT

Rule 23(e) of the Federal Rules of Civil Procedure provides that class actions "shall not be . . . compromised without the approval of the court, and notice of the pro-

posed . . . compromise shall be given to all members of the class in such manner as the court direct." By their motion, plaintiffs do not at this time seek final approval under this provision for the settlements at issue. Instead, plaintiffs seek preliminary approval of the proposed settlements so that, in accordance with Rule 23(e), notice of the proposed settlements may be sent to the class members in this litigation. *See Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970), *aff'd sub nom. Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

In order to determine whether such conditional approval should be granted, the trial court need only determine whether there is "probable cause" for informing the class about the settlements; in essence, it must decide whether the settlements fall within the "range of possible approval." * Manual for Complex Litigation, ¶ 1.46. As Judge Bue has said, the trial court is to "examine the terms of the settlement and determine if the settlement appears reasonable on its face." *Magana* v. *Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977).**

Of course, in undertaking this determination, the trial court necessarily uses as guideposts the criteria for ultimate approval of the settlements. With respect to that issue the Fifth Circuit has stated that "[p]articularly in class action suits, there is an overriding public inter-

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* This determination is committed to the sound discretion of the trial court. *See City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454 (2d Cir. 1974).

** It is clear that the determination should not include a decision on the merits. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978); *Young* v. *Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Florida Trailer Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

est in favor of settlement." *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Consequently, the trial court need merely insure "that (1) there is no fraud or collusion in arriving at the settlement and (2) the settlement is fair, adequate and reasonable . . ." *Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977).

Here, the settlements are reasonable on their face. They were executed after good faith, arms-length negotiations. And the nearly $300,000,000 in settlements is unquestionably fair, adequate and reasonable in the circumstances of this case. The settlements are therefore well within the range of possible approval and should be conditionally approved for the purpose of notice to the class.

I.

The Settlements Are A Product Of Good Faith, Arms-Length Negotiations

The nature of the settlement negotiations is pertinent to the decision whether to approve a class action settlement *, for "the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *accord*, *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1215, 1216 (5th Cir. 1978). As the *Cotton* court held, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* This is particularly true in

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* *See In re General Motors Corp. Engine Interchange Litigation*, No. 78-2036 (7th Cir., Feb. 26, 1979); *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). The settlement in the *GM Interchange Litigation* was negotiated in apparent contravention of trial court orders governing the same. As we shall see, that case has no bearing on the settlement at issue here.

complex antitrust litigation. *See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 664 (D. Minn. 1974). *See also In Re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 712 (M.D. Pa. 1978); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). Of course, there is not the slightest hint of fraud or collusion in the negotiation of these settlements. The negotiations were conducted in utmost good faith and at arms' length.

A. *The Negotiations Were Conducted In Accordance With Pretrial Order No. 2 With The Express Approval Of The Court.*

The St. Regis and International Paper settlements were concluded prior to class certification. Nevertheless, Pretrial Order No. 2 expressly authorized the Steering Committee to negotiate settlements on behalf of the class. And that class is of course now certified. In any event, in the instance of both settlements, plaintiffs' counsel obtained the express approval of the Court before conducting settlement negotiations.

The round of remaining settlements begun before Christmas of 1978 reflected the expressed desire of the Court that the parties attempt to achieve some compromise of the litigation. The Court was informed of the status of the first such settlement negotiation—that with Union Camp—as soon as it was concluded. The following avalanche of settlements was once again conducted under the supervision of the Steering Committee in accordance with Pretrial Order No. 2.

The settlement negotiations were, therefore, as open and above board as was possible in the circumstances. Likewise, they were conducted in full compliance with this Court's orders. There can be no question that they were undertaken in the best of faith.

B. *The Negotiations of All Parties Were Vigorous and Adversarial.*

The two settlements negotiated prior to class certification reflect just as much arms-length bargaining as do those negotiated after the Fifth Circuit denied defendants' petition for writ of mandamus on the certification issue. Prior to certification, it was vitally important for plaintiffs to obtain some substantial settlement for the class regardless of certification * and to obtain extensive cooperation in the pursuit of the class litigation. This plaintiffs were able to achieve at a time when most defendants had shown no interest in settlement whatsoever. The contingency of class certification at this stage cannot be overlooked. Most defendants did not discuss settlement seriously until the Fifth Circuit denied their mandamus petition.

After certification, the substantial threat to settlement at reasonable amounts became the possibility that defendants would form unbreakable coalitions. The settlements with Union Camp, Boise-Cascade and Champion went a long way toward effectively forestalling such a threat. And plaintiffs made up for these earlier discounted settlements by escalating their demands from later settlers.

Likewise, the terms of the settlement agreements became progressively more onerous. In the end, defendants

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* With respect to the St. Regis settlement, and all subsequent settlements with unindicted defendants, it should be remembered that until the *Corrugated* case, unindicted corporations had not customarily been named as civil defendants in national class action litigation, so that *any* recovery with an unindicted defendant in this case must be considered a significant improvement over prior antitrust class action settlements. Of course, the "unindicted" settlements, totalling $53,268,870, have been far from insubstantial here.

met substantially all of plaintiffs' conditions. Throughout the negotiations, there was not the slightest possibility that fraud or collusion was involved.

Finally, all plaintiff's counsel approved the St. Regis and IP settlements. There has been some dissent to the subsequent settlements,* but the overwhelming majority of plaintiffs' counsel support all of the settlements. On their judgment, which this Court should not lightly ignore, *see Cotton* v. *Hinton*, *supra*, all the proposed settlements should be approved.

II.

The Settlements Are Fair, Adequate And Reasonable

In making a final assessment of the reasonableness of a class action settlement, "the judge should form an educated estimate of the complexity, expense and likely duration of [the] . . . litigation, the possible difficulties of collecting on any judgment which might be obtained,**

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* As counsel to designated class representatives, James Sloan and Granville Specks expressed opposition to the post-certification pre-January 5th settlements initially on the ground that in spite of the fact that Mr. Montague, counsel to a sheet plant, supported them, it was improper for the class representatives to negotiate on behalf of both container purchasers and sheet purchasers without first agreeing on how any settlement amounts would be allocated between the two types of purchasers. They subsequently took the position that these settlements were inadequate or that they lacked sufficient information to determine whether they were adequate. More recently, they have stated that they have not decided whether they will oppose these settlements.

** Plaintiffs do not rely on this particular factor in support of the settlements. Plaintiffs do not dispute the fact that the Settling Defendants as a whole are probably solvent enough to pay the settlements several times over.

and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee* v. *Anderson*, 390 U.S. 414, 424 (1968), *quoted with approval in Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977). The Fifth Circuit in *Miller* also held "that the likelihood of success if litigated and the probable rewards of that litigation should be weighed in the decision." 559 F.2d at 429. This latter consideration is the most important. *See Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 712 (M.D. Pa. 1978). Given the contingencies inevitably present in any case of this type and complexity, the fairness of these settlements should be apparent.

A. *The Partial Settlements Do Not Reduce Significantly the Prospects of Full Single Damage Recovery for the Class*

Plaintiffs' experts estimate that the overcharges by Settling Defendants to the class are in the range of $185.8 million to $789.0 million. *See* Exhibit B, *infra*. In the case of final approval of a full settlement, a court would typically compare the settlement fund with this amount or range in order to evaluate the adequacy of the settlement. *See West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1084 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *In re Anthracite Coal Antitrust Litigation*, 79, F.R.D. 707, 714 (M.D. Pa. 1978). This is not the typical case. Here there is merely a partial settlement. Moreover, in each and every settlement agreement, the Settling Defendant has agreed to leave its sales in the lawsuit, thus making Non-Settling Defendants potentially liable for the full damage of the conspiracy. Consequently, it is the amount of the settlements plus the amount of judgment that Non-Settling Defendants would be able to pay which must be compared to the potential recovery in the case. As is demon-

strated in Exhibit C to this brief, the Non-Settling Defendants could pay a large enough judgment at least to cover the plaintiff class' single damages, even under the most optimistic measure of damages by plaintiffs' experts.

Even if the partial settlements were all the settlement fund to be received for the entire case, it would still be evident that the settlements fall within the range of possible approval. For example, in the *Anthracite Coal* case, the court approved a settlement equal to 28% of plaintiffs' projected single damages. 79 F.R.D. at 714. Even more telling are the partial settlements that were approved in the *Plywood* litigation. *In re Plywood Antitrust Litigation.* M.D.L. No. 159 (E.D. La., March 24, 1978). These partial settlements totaled approximately $58 million. Yet in finding that the non-settling *Plywood* defendants were liable for conspiring to fix plywood prices, the Louisiana jury established a measure of actual damages in the range of one billion dollars. These two cases demonstrate that antitrust class action litigation is risky business and that substantial settlements are not lightly disapproved.

Here, the partial settlements obtained to date represent a healthy percentage of plaintiffs' experts' highest estimate of the overcharge by Settling Defendants to the class. They are clearly within the range of possible approval.

B. *The Contingencies of Obtaining Full Recovery for the Class are Significant*

The plaintiffs would have run four risks in continuing to litigate against the Settling Defendants. First, there is the risk that plaintiffs might not ultimately be successful in proving their case. Second, they run the related risk that the class might be decertified in the course of continued litigation. Third, they run the risk of substantial opt-outs. Finally, there is the risk that legisla-

tion will be passed overruling the Supreme Court decisions in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

1. *Proof of the Class Case is not Certain*

The criminal trial has materially assisted the civil plaintiffs' nationwide price-fixing case, but contingencies remain. Testimony has largely pertained to price communications in three distinct geographic areas: New York City/New Jersey; Michigan; and Memphis/Little Rock. The Government has made no attempt to show that the conspiracy extended west of the Rockies. In addition, the Government has been fairly true to its word in its trial brief; it has made no effort to conclusively establish impact.

Plaintiffs, therefore, would have run some risk in establishing class-wide liability and impact as against Settling Defendants. Likewise, the evidence of damages is not airtight. Hence, it is not irrefutably demonstrable that class plaintiffs would have been able to establish their case in a civil trial against Settling Defendants. While plaintiffs remain confident of the viability of their case, it must be acknowledged that there would have been not inconsequential risks involved in going to trial against the Settling Defendants.

2. *Decertification Remains a Small But Perhaps Significant Risk*

Evidence of a class-wide conspiracy has emerged in the criminal trial, but little evidence of impact, has been presented. Of course, the criminal trial presentation bears no relationship to the one that would have been contemplated in a civil case against the Settling Defendants. Nevertheless, it is significant that the criminal trial does

not conclusively support plaintiffs' arguments on the class certification issue.

Of course, Settling Defendants would have been able to argue to the Fifth Circuit on appeal that the class should not have been certified. The risk of decertification, while quite small, was nevertheless present. And it is a risk that would have effectively foreclosed any relief against Settling Defendants for many class members.

3. *There May Be Risk of Substantial Opt-Outs*

As in any class action case, if any class members opt-out, the universe of potential damages is reduced. With a class of direct purchasers, there is a greater than usual risk that there will in fact be a substantial number of class members who will choose to opt-out rather than sue their supplier.

4. *Illinois Brick Legislation Threatens the Class Recovery*

In *Hanover Shoe*, the Supreme Court ruled that there was no "passing on" defense to a claim of price-fixing. In *Illinois Brick*, the Court ruled that, because of *Hanover Shoe*, indirect purchasers have no antitrust cause of action for price-fixing. The *Illinois Brick* decision has spawned a flurry of legislative activity designed to provide indirect purchasers with such a cause of action. Most of the proposed legislation* contains two critical features. First, the new bills would overrule *Hanover Shoe* as well as *Illinois Brick*. Second, the proposals would be retroactive in effect, so as to resurrect any pending indirect purchaser claims. If such legislation were passed, Settling Defendants—had they not settled—would have been provided with a defense as to direct

* See e.g. Antitrust Enforcement Act of 1978, S. 1874, H.R. 1942, 95th Cong. 2d Sess. (1978).

purchasers that could conceivably have foreclosed virtually all damage recovery by plaintiffs.

5. *Litigation Against Settling Defendants Would Have Been Protracted and Costly*

The Unified and Consolidated Complaint alleges a price-fixing conspiracy that is mammoth in scope, permeating a vast industry for at least eighteen years. As the evidence has unfolded in the criminal trial, it has become clear that there were a multitude of conspirators. Proving the existence and effect of this entire conspiracy will be a significant undertaking. Even as reduced in scope to take the settlements into account, the litigation will be lengthy and expensive. Absent the settlements, it might have reached unwieldy logistic and financial proportions.*

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* While plaintiffs firmly believe that the contribution issue raised by Westvaco is without merit—especially in the context of partial good faith settlements—all parties recognize that a general rule of contribution in antitrust cases would totally stymie settlement possibilities. Apart from its merits, the issue of contribution has been given renewed life by the post-settlement decision of the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply*, 1979-1 Trade Cas. § 62,485 (8th Cir., Feb. 27, 1979), and until that issue is resolved (perhaps conclusively on appeal), it is unlikely that any defendant would be as willing as were the settling defendants to assume the risk of a change-of-law and to pay a substantial amount to individually settle with plaintiffs. Certainly, any defendant willing to assume that risk would be more insistent, than were settling defendants, that its sales be eliminated from this case. All this means that disapproval of these settlements would either condemn the parties to lengthy litigation to judgment or require plaintiffs to settle with all defendants on a group basis that the history of this very case has indicated would produce a result much less favorable to the class.

6. *Conclusion*

Litigation against the Settling Defendants would have been a very costly and drawn out process, with no iron-clad guarantee of any recovery whatsoever for the class. Given the contingencies and expense of litigation, the substantial settlements reached with Settling Defendants are more than reasonable and adequate.

C. *The Settlement Agreements Remove the Risk of Reduced Recovery and the Prospect of Protracted Litigation Against Settling Defendants*

The effect of all compromise is to remove the risks of litigation and to save the parties the expense of going to trial. The Settlement Agreements entered into with Settling Defendants do even more. They also remove the risk of decertification, deal effectively with opt-outs, overcome the threat of *Illinois Brick* legislation, greatly reduce the expense of litigating against Settling Defendants and help reduce the expense of litigating against the Non-Settling Defendants.

1. *The Settlements Stand Even in the Event of Decertification*

Each of the settlement agreements stipulates a class to receive the settlement at issue. Although Settling Defendants argued against it, each of the agreements has a paragraph providing that the settlement takes effect regardless of the continued certification of that class (or subclass). The agreements, therefore, wholly remove the risk of decertification.

2. *The Settlements Contain Opt-Out Provisions That Favor the Settlement Classes*

The settlements approved in *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404

U.S. 871 (1971), provided that the settlement would be reduced in proportion to the number of opt-outs. *Id.* at 1082. The post-certification agreements executed here contain "opt-out" provisions that are far more favorable to the class, for they merely give the Settling Defendant the right to repudiate the settlement if a certain percentage of purchasers request exclusion and actually file suit. In no event is the settlement amount to be reduced.* The risk of substantial opt-outs is therefore largely averted.

3. *The Settlements For the Most Part Provide Settling Defendants With No Illinois Brick Protection*

In the *Anthracite Coal* litigation, the settlement agreements, executed in May and July of 1978, and approved in September of 1978, set aside a portion of the settlement for allocation to an indirect purchaser class should Congress have overruled *Illinois Brick* prior to January 1, 1979. *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 710 (M.D. Pa. 1978). The first three settlements in this case had similar provisions; two of these provisions have now expired. None of the remaining agreements gave any such protection to Settling Defendant. In effect, the corrugated class now stands in a better position then did the *Anthracite* class on the date of approval. The risk of *Illinois Brick* legislation has been completely avoided.

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* That their settlement agreements will stand in the face of substantial opt-outs also benefits plaintiffs because the opt-outs will reduce the amount of claims against the settlement funds, thereby making available a greater recovery to the remaining members of the class.

4. *The Cooperation Provisions in the Settlement Agreements Should Reduce the Cost of Litigating Against Non-Settling Defendants*

The Settlement Agreements contain extensive cooperation agreements whereby each Settling Defendant has agreed to assist the class plaintiffs in pursuing the litigation against the Non-Settling Defendants. To the extent that these cooperation provisions are made effective, the class plaintiffs should be able to save their time and the class' expense in the remaining litigation.

The value of the extensive cooperation agreement has already been shown. Because of these provisions, plaintiffs' counsel were able to arrange conferences between plaintiffs' expert economist, Dr. Richard Hoyt, and the chief economists for International Paper Co. and St. Regis. These conferences occurred in New York on March 8 and 9, 1979. They were followed by a telephone conference between Dr. Hoyt and the IP economist on April 11, and between Hoyt and the St. Regis economist on April 12. These conferences were valuable in providing plaintiffs with background economic and other information respecting the corrugated container industry, and in refining the assumptions being employed in plaintiffs' damages estimates. The cooperation clauses have also offered plaintiffs the opportunity for an on-site tour of St. Regis' corporate headquarters in Pittsburgh, Pennsylvania, occurring on April 3, 1979, and IP's corporate headquarters in New York City, occurring on April 11, 1979, for the purpose of learning the nature and amount of economic and other documentation such a headquarters should contain. The resultant refinement of plaintiffs' discovery against the Non-Settling Defendants will save thousands of dollars in fees and expenses to the class members. Further evidence of the importance of the Settling Defendants' cooperation agreements is the fact that the agreements with IP and St. Regis

have recently been amended to carve out $400,000.00 of the amounts paid in settlement for the purpose of meeting the expenses incurred by plaintiffs in preparing a list of class members and mailing class notice.

D. *When Liability Has Not Been Established, Single Damages For The Four-Year Limitation Period Have Been Considered An Appropriate Method For Evaluation Of Proposed Settlements*

In *City of Detroit* v. *Grinnell Corp.* 484 F.2d 448, 458-59 (2nd Cir. 1974), the Court stated the reasons for using single damages as a measure against which to evaluate settlements:

> While it is true that treble damages are extracted from a Defendant who untimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of Courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval of settlements which are traditionally based on an estimate of single damages only. . . Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires Defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that Defendants never have to concede their guilt. They can protect their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base

> liability figure would force defendant automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

The cases also establish that the four-year statute of limitations period is the appropriate basis for calculating the single damages measure. In the *City of Detroit* case in the district court, 356 F.Supp. 1380, 1386 (S.D.N.Y. 1972), Judge Metzner stated:

> [I]n most of the settlements approved in other class action antitrust cases, the period has been 4 years which is the statute of limitations for such actions...

III

Plaintiffs' Proposed Plan of Allocation and Distribution

A. *Pre-January 5th Settlements*

The pre-January 5th settlements were negotiated on behalf of all purchasers of corrugated containers or sheets from any defendant or any subsidiary or affiliate of any defendant at any time from January 1, 1960 to January 25, 1978. Plaintiffs therefore believe it appropriate for the Court to approve for the pre-January 5th settlement the following Plan of Allocation and Distribution, which will reimburse members of both the container purchaser and sheet plant sub-classes who purchased corrugated containers or corrugated sheets from defendants between January 1, 1960 to January 25, 1978, inclusive, for allowed purchases on a pro rata basis after deduction for fees and expenses under the proposed plan:

(a) All settlement funds created by pre-January 5th settlements will be added together to create a single fund ("Classwide Fund");

(b) All class members desiring to participate in the Classwide Fund will submit their claims on the basis of dollars of corrugated containers and sheets purchased from any of the defendants, including subsidiaries and affiliates, during the period January 1, 1960 through January 25, 1978, on the claim form appended to the Proposed Form of Notice, filed herewith;

(c) The claim forms will be checked and, where appropriate, will be audited by a committee of plaintiffs' counsel and an independent firm of certified public accountants;

(d) The allowed claims of all class members will be totalled; and

(e) Each claimant will receive a pro rata share of the Classwide Fund (after deduction of attorneys' fees and costs) based upon its allowed claim as they relate to the allowed claims of all class members.*

B. *Post-January 5th Settlements*

These settlements were negotiated on behalf of the container purchaser sub-class only. While these settlements provide that the Court, upon application of the sheet plant sub-class, may allocate a portion of these settlements (not to exceed $14,896,245) to the sheet plant sub-class, no such application has been made nor have

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* This Plan of Allocation and Distribution has, after arms-length negotiation, been agreed to by the undersigned representatives of both the container purchaser sub-class and the sheet plant sub-class.

the representatives of the container purchaser sub-class determined what response, if any, they would make to such application. Accordingly, the representatives of the container purchaser sub-class propose the following Plan of Distribution as to the post-January 5th settlements:

(a) All settlement funds created by the post-January 5th settlements will be added together to create a single fund ("Container Purchaser Sub-class Fund");

(b) The members of the container purchaser sub-class desiring to participate in the Container Purchaser Sub-class Fund will submit their claims on the basis of dollars of corrugated containers and sheets purchased from any of the defendants, including subsidiaries and affiliates, during the period January 1, 1960 through January 25, 1978, on the claim form appended to the Proposed Form of Notice, filed herewith;

(c) The claim forms will be checked and, where appropriate, will be audited by a committee of plaintiffs' counsel and an independent firm of certified public accountants;

(d) The allowed claims of all members of the container purchaser sub-class will be totalled; and

(e) Each claimant who is a member of the container purchaser sub-class will receive a pro rata share of the Container Purchaser Fund (after deduction of the portion of said Fund, if any, that the Court allocates to the sheet plant sub-class and attorneys' fees and costs) based upon its allowed claims as they relate to the allowed claims of all members of the container purchaser sub-class.

IV

Fees And Expenses

The Steering Committee is responsible for assigning work in this litigation and monitoring the time spent by attorneys in performing such work. In accordance with the Court's repeated instructions to eliminate duplicative and unnecessary work and thus minimize the expense of the litigation to the class, the Steering Committee has required that all class attorneys turn in to the plaintiffs' Attorneys Time and Disbursement Committee a monthly breakdown of time and expenses. This report is to describe in detail the time spent by lawyers and legal assistants on various aspects of this case and to itemize all expenses incurred on behalf of the class. To enforce this reporting requirement, the Steering Committee has refused to assign work to those attorneys who are delinquent in turning in their time and expense reports. In addition, it has assured all attorneys that the Steering Committee, in connection with any fee application, will notify the Court that it is unable to vouch for the reasonableness and necessity of any attorney and legal assistant hours spent during any months for which the Attorneys Time and Disbursement Committee received no time and expense report within the hundred-day period following the expiration of that month.

As of April 1, 1979, twelve attorneys, out of the forty-nine attorneys required to report time, were delinquent in their time and expense reports to the Attorneys Time and Disbursement Committee. Nevertheless, including the time of these delinquent attorneys to the extent that they have reported time and disbursements, as of April 1, 1979, twenty-six thousand two hundred twenty (26,220) hours of attorneys' time and six thousand seven hundred fifteen (6,715) hours of legal assistants' time has been reported as having been expended on this case.

Obviously, some of the attorney time reported was expended by senior attorneys and some by junior attorneys, some on complex tasks and some on routine tasks. Without attempting at this time to analyze the number of hours reported, it should suffice for present purposes to point out that if the Court were to compensate all attorneys for each and every hour reported in this case at an average rate of $300 per hour and each legal assistant at a rate of $35 per hour, the total fee award to date would amount to $8,100,990.00.

The expenses of this litigation have been handled in two ways. First, each attorney who plans to file a fee application has been asked to pay routine assessments to the Plaintiffs' Corrugated Committee to cover reproduction costs, document depository costs, expert fees, liaison counsel expenses, etc. Furthermore, as to those expenses which are not paid centrally but rather disbursed by each attorney for items such as his own travel expenses—telephone expenses, reproduction expenses, etc. —each attorney has been required to report these on a monthly basis to the Attorneys' Time and Disbursement Committee. As of April 1, 1979, the expenses disbursed by the Plaintiffs' Corrugated Committee on behalf of all plaintiffs amounted to $201,871.40, and the expenses individually advanced by each attorney (excluding the payment of common assessments) totaled $281,853.85, or a total expenditure to date of $483,725.25.

In view of the above, the Steering Committee estimates that as of April 1st, the maximum fees and expenses incurred to that time and payable out of the settlements should not exceed $9,000,000.00, or three percent (3%) of the principal of the settlement funds. As pointed out above, the amount of interest earned on these funds *to date* more than adequately covers the attorneys' fees and expenses incurred since the inception

of these cases. While plaintiffs anticipate that their attorneys will continue to expend time and incur expenses in connection with the post-April 1st prosecution of this case against the non-settling defendants, it is inconceivable that these fees and expenses would at any time exceed the interest currently being earned on the settlement funds. As a result, plaintiffs are confident that no antitrust class action recovery in history has been obtained for as small a percentage of fees and expenses as has been required in this case.

CONCLUSION

The function of the Court in preliminarily passing upon the reasonableness of a class action settlement is to assure that the class representatives who have negotiated the same have adequately and vigorously championed the rights of the class and to assure that the ultimate recovery to the class will not be unnecessarily diminished by the expense of notifying the class of a settlement that is woefully inadequate and that the Court, upon objection by any class member, would probably not approve. The Court is not to conduct a mini-trial nor to substitute its judgment for that of plaintiffs' counsel. It is simply to determine whether, under all the circumstances, plaintiffs' counsel made a good faith effort to exercise their judgment in the best interest of the class. Obviously, that judgment had to be exercised at a particular point in time in light of the information that plaintiffs' counsel reasonably have had available to them at that point in time. Any trial lawyer worth his salt knows that hindsight is better than foresight and that litigation is a living organism that rarely remains static and always requires a readjustment of one's views of the merits of the case. For that reason, in the non-

class action context, trial lawyers are reluctant to evaluate their settlement decisions in terms of hindsight lest they be immobilized from grasping reasonable settlement opportunities for fear of leaving money on the table. While Rule 23 arguable requires courts to evaluate class settlements in light of the circumstances existing at the time they are presented for approval, the courts should be reluctant, in conducting such postmortem evaluations, to hold class counsel to too high a standard of clairvoyance, for to do so would discourage all settlements of class actions until the eve of trial.

Obviously, there is no suggestion here that plaintiffs' counsel exercised anything other than their best judgment as to when and how to maximize recovery for the class. There is no hint of collusion with settling defendants or failure to consider carefully all the evidence that was then available, including the preliminary estimates of plaintiffs' experts based thereon. While those estimates have now been revised and refined (based primarily on information that has been furnished by the settling defendants and that was not available when the individual settlements were negotiated), the settlements are well within the range of the experts' current estimates. In assessing the reasonableness of such estimates, the Court should keep in mind the great leeway and flexibility accorded plaintiffs in providing the amount of damages in an antitrust trial. The Fifth Circuit has frequently emphasized that "proof of losses which border on the speculative must be resorted to in order to implement the policy of the antitrust laws," *Hobart Bros. Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973), and that plaintiff's "expert on damages need not be armed on the right hand with slide rule, and on the left with a com-

puter. He is allowed some economic imagination so long as it does not become fantasy," *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 25 (5th Cir. 1974) (*en banc*). And if those are the standards to be applied to determining damages *at trial*, then certainly a more exacting standard cannot be expected of plaintiffs' economists in estimating damages, prior to normal merit discovery, for the purpose of evaluating class settlements.

The ultimate issue before the Court at this time is whether the Court is convinced that the disapproval of these settlements will likely result in a greater recovery, either through settlement or trial, for the class members. And the Court must make that decision, not only in light of various estimates of potential damages, but also in light of all that has transpired since many of the settlements were negotiated: the creation of a sheet plant subclass, the introduction of *Illinois Brick* legislation, the evidence in the criminal trial, and the renewed vigor with which one of the non-settling defendants has sought to assert a claim for contribution against the settling defendants. And even were the Court firmly convinced that the atmospheric conditions that existed in December and January will again be ripe to produce a desire on the part of defendants to settle this litigation, the Court must also consider the expense to the class of continuing to vigorously prosecute this action against all defendants until such time as those magic moments reoccur. Will the Court be able to say then, as it can with confidence now, that the history of this litigation unequivocally demonstrates that there are class actions that benefit the class members considerably more than their attorneys?

For the foregoing reasons, the undersigned plaintiffs respectfully request that all settlements presently before

the Court be preliminarily approved and that the class be given notice of the same.

Respectfully submitted,

Of Counsel:

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Chairman, Plaintiffs'
Settlement Justification
Committee
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University of Texas
School of Law
Austin, Texas (on leave)

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Vice Chairman, Plaintiffs'
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1100 National City Bank
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BY /s/ *Stephen D. Susman*
STEPHEN D. SUSMAN
On Behalf of All Plaintiffs
Supporting Settlements

[Certificate of Service omitted]

EXHIBIT A
SETTLEMENTS-TO-DATE IN ORDER OF NEGOTIATION

Defendant	1972-76 % of Defts Mkt*	$1 Million per point	Settlement (in millions)	For	Maximum Possible Allocation Sheet Plant SubClass (in millions)	Date Exec. **	Payment	Other Terms
1. St. Regis	3.97	.428	1.7	All		7/21/78	Cash	Ill. Brick protection (now expired); walk-away on opt-outs.
2. I. P.	8.3	1.0	8.3	All		8/24/78	Cash	Ill. Brick protection (now expired); walk-away on opt-outs; waiver of privileges.
3. Union Camp	3.7	2.0	7.4	All		12/20/78	Cash	Ltd. *Ill-Brick*; Ltd. opt-out; stipulated class.
4. Diamond	.5	2.0	1.0	All		12/22/78	Cash	No *Brick*; no opt-out; stipulated class; waiver of privileges.
5. Dura	.375	2.0	.750	All		1/ 3/79	Letter of credit due 9/3/79 at 11%	No *Brick*; no opt-out; stipulated class.
6. Chesapeake	1.26	2.4	3.024	All		12/28/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
7. Longview	2.58	2.5	6.45	All		12/21/78	Cash on 2/15	No *Brick*; Ltd. opt-out; stipulated class.
8. Boise-Cascade	2.826	3.5	9.891	All		12/27/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
9. Willamette	4.18	2.7	11.286	All		12/28/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
10. Champion	5.36	4.5	24.120	All		12/27/78	Cash	No *Brick*; Ltd. opt-out; stipulated class.
11. Menasha	1.67	2.75	4.592250	All		1/15/79	Cash on 2/15	No *Brick*; Ltd. opt-out; stipulated class.
12. CCA	8.56	4.0	34.240	CPSC	1.3696	1/25/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
13. Weyerhaeuser	7.83	5.0	39.150	CPSC	2.54475	1/23/79	Cash on 1/25	No *Brick*; Ltd. opt-out; stipulated class.

EXHIBIT A—Continued

SETTLEMENTS-TO-DATE IN ORDER OF NEGOTIATION

Defendant	1972-76 % of Defts Mkt*	$1 Million per point	Settlement (in millions)	For	Maximum Possible Allocation Sheet Plant SubClass (in millions)	Date Exec. **	Payment	Other Terms
14. McMillan-Bloedel	2.11	4.0	8.44	CPSC	.838986	2/28/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
15. Owens-Ill.	5.45	6.0	32.7	CPSC	2.289	1/26/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
16. Olinkraft	1.225	6.0	7.35	CPSC	.393093	1/19/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
17. Continental Group	4.22	6.5	27.43	CPSC	1.89267	3/ 8/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
18. Inland	7.29	4.75	34.6275	CPSC	2.07765	2/16/79	Cash	No *Brick*; Ltd. opt-out; stipulated class.
19. Stone	3.055	4.75	14.511250	CPSC	1.39308	2/12/79	Cash on 3/1	No *Brick*; Ltd. opt-out; stipulated class. Conditioned on obtaining waivers from Secured Creditors.
20. St. Joe	2.625	4.75	12.46875	CPSC	1.0349	2/20/79	Cash on 3/1	No *Brick*; Ltd. opt-out; stipulated class.
21. U. S. Corrugated	.76728	4.0	3.06912	CPSC	.334534	3/23/79	1.53456 on 3/1; .383640 on 5/7, 8/24, 11/1, and 1/2/80	No *Brick*; Ltd. opt-out; stipulated class.
22. Green Bay	1.71	3.25	5.5575	CPSC	.728032	3/14/79	Promissory note due on 3/1/81, or final approval with interest quarterly at escrow rate.	No *Brick*; Ltd. opt-out; stipulated class.
TOTAL	79.56328		298.05737		14.896245			

* Assuming defendants account for 72% of the total market.

** Frequently, the agreements were executed some time after they were negotiated and orally agreed to by counsel.

TABLE 2

ESTIMATED OVERCHARGES UNDER ALTERNATIVE ASSUMPTIONS OF SALES AND NET PROFITS

Model Number	Model Type	Sales ($000)	Damage Period (Months)	Average Net Profits (% Sales)		Estimated Overcharges ($000)
1	During & After	$11,759,100	48	1973-76	7.55	
				1977-78	.84	
				Differ.	6.71%	$789,036
2	During & After	$10,907,586	45	1973-76	7.55	
				1977-78	.84	
				Differ.	6.71%	$731,899
3	During & After	$10,907,586	45	1972-76	6.28	
				1977-78	.84	
				Differ.	5.44%	$593,372
4	During & After	$ 7,581,778	33	1973-75	8.81	
				1976-78	1.81	
				Differ.	7.00%	$530,724
5	During & After	$ 7,581,778	33	1970-75	6.91	
				1976-78	1.81	
				Differ.	5.10%	$386,670
6	During & After	$11,759,100	48	1972-75	4.26	
				1976-78	1.81	
				Differ.	2.45%	$288,097
7	During & After	$ 7,581,778	33	1971-75	5.07	
				1976-78	1.81	
				Differ.	3.26%	$247,165
8	During & After	$ 7,581,778	33	1970-75	4.26	
				1976-78	1.81	
				Differ.	2.45%	$185,753

APPENDIX A

PERSONAL DATA SUMMARY

RICHARD C. HOYT

Date of Birth: September 30, 1939

Place of Birth: St. Paul, Minnesota

Armed Service Record: Commissioned 2nd Lt. in the U.S. Army Corps of Engineers February 1962; honorably discharged February 1965.

Education:

Secondary School: Shattuck School
Faribault, Minnesota
Years attended: 1954 to 1957

College: Kansas State University
Manhattan, Kansas
Years attended: 1957 to 1962
Degree: Bachelor of Science in Milling Technology; received in February 1962.

University of Minnesota
St. Paul, Minnesota
Years attended: 1966 to 1972
Degree: Master of Science in Economics; received in June 1968
Degree: Ph.D. in Applied Economics; received in June 1972
Thesis: A Dynamic Econometric Model of the Milling and Baking Industry.

Professional Experience:

Position:	Milling Engineer Tennant and Hoyt Company Lake City, Minnesota 55041 Date: June 1965 to August 1966
Position:	Research Assistant Department of Agricultural and Applied Economics University of Minnesota St. Paul, Minnesota 55101 Date: March 1967 to March 1971
Position:	President Tennant and Hoyt Company Lake City, Minnesota 55041 Date: April 1971 to August 1972
Position:	President Analytics, Incorporated 464 Second Street Excelsior, Minnesota 55331 Date: September 1972 to present
Position:	Instructor William Mitchell College of Law St. Paul, Minnesota 55105 Date: 1977-78
Position:	MBA Faculty College of St. Thomas St. Paul, Minnesota 55105 Date: 1978-79

Membership in Professional and Honorary Organizations:

American Agricultural Economics Association
Gamma Sigma Delta
American Economic Association
Operations Research Society of America
The Institute of Management Science

Publications:

John H. Sanders and Richard C. Hoyt, "The World Food Problem; Four Recent Empirical Studies," *American Journal of Agricultural Economics*, Volume 52, Number 1, February 1970.

Richard C. Hoyt and Dale C. Dahl, "The Milling Industry: Recent Developments and Future Growth," *Minnesota Agricultural Economist*, Agricultural Extension Service, University of Minnesota, Number 528, March 1970.

Richard C. Hoyt, "A Simulation Model of the Milling and Baking Industries," *Southwestern Miller*, May 1971.

Richard C. Hoyt, Dale C. Dahl, and Stuart D. Gibson, "A Comprehensive Model for Assessing Lost Profits to Antitrust Plaintiffs," *University of Minnesota Law Review*, Volume 60, Number 6, 1976.

Partial List of Legal Case Experience:

Dorey Corp. v. *E.I. DuPont de Nemours and Co.*, No. 74 Civ. 3826 (S.D.N.Y., filed 1974)

Doughboy Industries, Inc. v. *American Cyanamid Co.*, No. 4068 Civ. 409 (D. Minn.)

Hoffert v. *American Cyanamid Co.*, No. 4069 Civ. 458 (D. Minn.)

International Rectifier Corp. v. *American Cyanamid Co.*, No. 70 Civ. 180 (S.D.N.Y., filed 1970)

Midwest Veterinary Supply Co. v. *American Cyanamid Co.*, No. 70 Civ. 180 (S.D.N.Y., filed 1970)

Seeco, Inc. v. *Great Western Sugar Co.*, No. 4-75 Civ. 116 (D. Minn., filed 1975)

Windham v. *American Brands, Inc.*, No. 74 Civ. 1008 (D.S.C., filed 1974)

White Industries, Inc. v. *Cessna Aircraft*, No. 123 (W.D. Mo.)

Oskey Gasoline and Oil Co., Inc. v. *OKC Refining, Inc.*, No. 4-73 Civ. 180 (D. Minn., filed 1973)

Decker v. *Safeway Stores, Inc.*, No. 248 (N.D. Tex.)

Carlson Companies, Inc. v. *Sperry and Hutchinson Co.*, No. 4-72 Civ. 327 (D. Minn., filed 1972)

Hoyt Construction Co., Inc. v. *Alside, Inc.*, No. 4-75 Civ. 257 (D. Minn., filed 1975)

Anderson v. *Alside, Inc.*, No. 3-76 Civ. 173 (D. Minn., filed 1976)

Meat Price Investigation Assn. v. *Safeway Stores, Inc.*, No. 75-333-2 (S.D. Ia., filed 1975)

Consumer Oil Co. v. *Continental Oil Co.*, No. 4-76 Civ. 61 (D. Minn., filed 1976)

Afton House Corp. v. *Genesco, Inc.*, No. 4-75 Civ. 271 (D. Minn., filed 1975)

Germany v. *Pfizer, Inc.*, Nos. 4-71 Civ. 435, 4-74 Civ. 614 (D. Minn., filed 1974)

St. Marie & Son, Inc. v. *Hartz Mountain Corp.*, No. 4-75 Civ. 638 (D. Minn., filed 1975)

O'Brien Tire, Inc. v. *Goodyear Tire & Rubber Co.*, No. 4-77 Civ. 137 (D. Minn., filed 1977)

Gordon's Waltham Liquor Store, Inc. v. *Stone*, No. 75 Civ. 308-G (D. Mass., filed 1975)

Neudecker v. *Rathman*, No. 15965 (Minn., 5th Jud. Dist.)

DeCramer v. *Esping*, No. 16569 (Minn. 5th Jud. Dist.)

Goulding v. *Nielsen*, No. 392964 (Minn. 2nd Jud. Dist.)

Barrick v. *Dahl*, No. 16411 (Minn. 8th Jud. Dist.)

Forrester v. *Burlington Northern Railroad*, No. 699603 (Minn. 4th Jud. Dist.)

Stark v. *Murphy Trucking* (not in suit)

Schmidt v. *Collegiate Enterprises*, No. 4-74 Civ. 326 (D. Minn., filed 1974)

Anderson v. *Burlington Northern Railroad,* No. 729-479 (Minn. 4th Jud. Dist.)

Parson v. *United States of America,* No. F-66-32 Civ. (E.D. Cal.)

Sanford v. *Lineberg,* No. 723357 (Minn. 4th Jud. Dist.)

Waymire v. *Foremost Foods, Inc.,* No. 67277 (Kan.-Johnson County Dist.)

Hagel v. *Nivala,* No. 707042 (Minn. 4th Jud. Dist.)

Goldfarb, P.A. v. *Northwestern Bell Telephone Co.,* (Minn. 4th Jud. Dist.)

Rajender v. *University of Minnesota,* (D. Minn.)

Stoll v. *Gilbertson,* (Minn. 4th Jud. Dist.)

Snodgrass v. *Monson,* (Minn. 10th Jud. Dist.)

National Organization of Women v. *Minnesota Mining and Manufacturing,* No. 4-74 Civ. 555 (D. Minn., filed 1974)

Science Products Co., Inc. v. *Chevron Chemical Co., Inc.,* No. 69C2647 (N.D. Ill.)

Willmar Poultry v. *Morton-Norwich Products, Inc.,* No. 4-74 Civ. 276 (D. Minn., filed 1974)

Sun Newspapers v. *Minneapolis Star & Tribune,* (not in suit)

Forcier v. *State Farm Insurance,* (Minn. 4th Jud. Dist.)

Eldridge v. *Inland Steel Co.,* No. 7462851 (D. Ill.)

Chase v. *Home Insurance Co.,* (D. N.D.)

In Re Corrugated Container, No. M.D.L. 310 (S.D. Tex.)

United States of America v. *Armco Steel Corporation,* 73-H-336 (S.D. Tex., Houston Div.)

Samuel J. Tripp v. *Gulf Oil Corporation,* 4-78-Civ. 326 (D. Minn.)

Ignacio Cantu v. *Owatonna Canning Co.*, 3-76 Civ. 374 (D. Minn.)

In Re Folding Cartons, M.D.L. 250 (N. Ill.)

Harold & Margot Siegel v. *Empire Savings Bank*, (Minn. 4th Jud. Dist.)

William E. Forbush v. *Burlington Northern, Inc.*, Civ. 4-78-461 (D. Minn.)

EXHIBIT B

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

AFFIDAVIT OF RICHARD C. HOYT

I, RICHARD C. HOYT, being first duly sworn, depose and say:

I am President of Analytics, Inc., an economic consulting firm located at 464 Second Street, Excelsior, Minnesota.

I received a Ph.D. in Agriculture and Applied Economics from the University of Minnesota in June, 1972.

I have written and published several articles on economics, and have been employed as an expert consultant by both plaintiffs and defendants in connection with numerous lawsuits. I have been qualified as an expert witness on issues pertaining to the proof and calculation of damages both in antitrust and non-antitrust suits, a partial list of which is included in my personal data summary appended hereto (Appendix A.).

I have been asked by plaintiffs' counsel to review and analyze all of the available economic data supplied by plaintiffs and defendants in connection with this lawsuit, as well as public information relating to the corrugated container industry, for purposes of arriving at an estimate of damages sustained by members of the class certified by the Court in this action.

I. *Introduction*: Alternative Methodologies

Damages in antitrust cases of the nature of this action have typically been measured by one or a combination of the "before and after" or the "yardstick" methods. My Affidavit in support of plaintiffs' motion for class determination, dated July 15, 1978, states that either the before-and-after or the yardstick approach could be used in this case to show both classwide damages and damages to each class member. Having completed additional research by reviewing documents contained in the plaintiffs' and defendants' document depositories in Houston, Texas, including most of the documents of an economic nature produced in response to Grand Jury Subpoenas, studying additional data submitted by the Fibre Box Association and the Settling Defendants, and interviewing economists employed by International Paper Company and St. Regis Paper Company, I now believe that, on the basis of the data presently available, the conceptual framework likely to provide the most accurate method of estimating the overcharges made by Settling Defendants to the class in this action is a variation of the before-and-after model. The basis for this conclusion is summarized below.

The yardstick model normally compares the performance of two or more industries or firms during the period of impact of an antitrust violation to the performance of a similar industry or company that was not affected by defendants' anti-competitive practices. The use of this approach requires that the yardstick industry or firm be engaged in a similar, but not identical, line of business. Secondly, the competitive industries or firms should operate in a market structure where cost and demand conditions are similar to those the plaintiffs would have faced absent the alleged violation. This means that the yardstick firm or industry cannot be used successfully if:

1. there is disparity between the size and number of firms in the relevant market;
2. there is widespread product differentiation in the market;
3. the degree of vertical integration is significantly different between industries;
4. the barriers to entry in the respective industries are characteristically dissimilar; and/or
5. there is considerable variability in the capitalization ratios between firms or industries.

Further requirements of the yardstick approach are that the yardstick firm or industry occupy a market position similar to the position that defendants would have held absent the alleged violation. Of course, defendant's firm cannot be used as the yardstick firm. Consequently, while the yardstick theory might be useful in some circumstances, it appears to have certain limitations as a damage model with regard to estimating damages in this action.

In the first place, there is no evidence that any identifiable members of the corrugated container industry were withdrawn from anti-competitive activities for an ascertainable period during the alleged price-fixing conspiracy. Moreover, similar industries, i.e., industries under the heading Paper and Allied Products (SIC 26), such as folding cartons and fine paper, were apparently involved in similar anti-competitive activity during the same period as the alleged corrugated conspiracy. Hence, there does not appear to be available a yardstick or comparable firm or industry that is known to have been fully competitive during some identifiable period of the alleged conspiracy in the corrugated container industry.

The before-and-after approach can be employed to compare defendants' prices and/or profits in two distinct

time periods as a basis for estimating the degree of overcharge. This theory can, for example, utilize defendants' prices and/or profits in a normative and non-competitive period as a basis for determining the degree to which prices were maintained at supra-competitive levels. There are three possible variations to this approach. First, prices charged and/or profits earned prior to and during the period of impact of an antitrust violation may be interpolated to calculate the degree of overcharge. Secondly, prices charged and/or profits earned between the periods of impact of two distinct antitrust violations may be used as the basis for determining overcharge. And finally, prices charged and/or profits earned during and immediately after the period of impact may be compared. It is this latter variation which has been used to estimate the overcharge in this action.

The analysis employed here compares profits earned during and immediately after the conspiracy period to calculate the estimated overcharge, and assumes that any differences noted are the result of changing levels of competition. Net profits before taxes as a performance variable was preferable to prices for several reasons. First, net profits are the difference between total revenues (prices times quantities shipped) and total costs. This is important since, to the degree one can define a level of profits which is sufficient to pay all costs (explicit and implicit) and still entice an enterprise to continue in business, and at the same time note a divergence from that level coincident with an alleged conspiracy, the difference can be thought of as excess profits and thus the illegal overcharge to the class. Additionally, the concept of profits takes into account other macro and micro economic phenomena which also typically influence total revenues and total costs. Secondly, usable time-series price information has not been available for individual defendants. The average annual prices published by the Fibre Box Association were not suitable, since the an-

nual averages reflected prices charged by all members of the Association, including some but not all of the Settling Defendants, the non-settling defendants, as well as other firms. The Settling Defendants related that only with great difficulty and at considerable expenditures of time and money could such information be computed, and then probably only for very recent years.

II. *Research Procedures.*

My involvement in the corrugated containers litigation began on June 23, 1978, when I was contacted by Mr. Vance K. Opperman about the possibility of serving as an economic consultant with regard to class certification. I agreed to conduct the necessary studies. On July 7, 1978, I attended a meeting in Philadelphia, Pennsylvania, with the committee responsible for drafting a memorandum in support of class determination in this action. At that meeting, I specified the economic materials that would be necessary to enable me to form an opinion as to my ability to estimate damages to the proposed class and as to the most appropriate methodology for doing so. This information was provided to me, and I spent the time between July 10, 1978, and July 15, 1978, in Houston preparing an affidavit in support of class determination. The affidavit was filed with the Court on July 15, 1978. Subsequent to filing my affidavit in support of class determination I was requested by plaintiffs' counsel to begin analyzing damages as they may relate to the corrugated containers industry. This research began on July 28, 1978. A preliminary report was given by me to members of the Plaintiffs' Ad Hoc Settlement Committee on August 4, 1978. This report considered alternative damage models. It used aggregate industry statistics for purposes of estimating damages. At the same time, I attempted to analyze other sub-industries of the Paper and Pulp Industry (SIC 26) for possible utilization in a yardstick context.

With the advent of new data in December of 1978, I began revising studies I had done in July. In doing so, I made another trip to Houston to further review and analyze documents maintained in plaintiffs' and defendants' depositories. This was accomplished between December 18 and December 20, 1978. On December 20th, I presented and reviewed with Professor Jeffrey L. Harrison, a Ph.D. economist with the University of Houston School of Law, all of the materials I had gathered and written. All of the possible theories of damages were considered and analyzed for purposes of submitting an updated report to the Plaintiffs' Ad Hoc Settlement Committee. On January 4, 1979, Professor Harrison and I made a verbal report to this Committee indicating all of the theories of damages analyzed to date and the results under each alternative model. The models that were considered at the time were the yardstick theory, the before-and-after model, and several alternative sets of price prediction models using time series and least squares regression analysis. The report submitted to the Committee on January 4, 1979, concluded that a before-and-after concept was the most appropriate methodology since it was consistent with the liability issues and since the data were most complete for that formulation. It was noted at the January 4, 1979, meeting that information maintained by the Fibre Box Association (FBA) in Chicago could be useful in alternative formulations of several of the models. On January 10, 1979, I attended a meeting at the FBA headquarters in Chicago, Illinois, at which time Mr. Martin Browning answered questions with regard to the reporting and document retention procedures of the FBA. Subsequently, certain FBA documents identified as being relevant to the overall economic analysis were requested and received for our purposes of incorporating the information into the alternative damage models discussed above. Between January 10, 1979, and the present time, a considerable amount of

time was spent refining various estimates heretofore mentioned. This additional investigation has included numerous conversations with Settling Defendants' counsel to verify statistics placed in the depositories and data received by letter and telephone for purposes of this analysis. Furthermore, I spent three additional days in Houston, Texas between February 26, 1979, and February 28, 1979, further reviewing economic documents contained in both plaintiffs' and defendants' depositories. Some of the data gleaned from the depositories were subjected to computer analysis for purposes of better understanding the nature of pricing of corrugated containers and the factors that have historically affected price variations since as early as 1955.

In order to gain additional understanding of the corrugated container industry and the nature of the data being submitted by the Settling Defendants, I had conferences in New York City, New York on March 8 and March 9, 1979, with the chief economists for International Paper Company and St. Regis Paper Company. These discussions were very useful, since they provided additional background and economic information concerning the corrugated containers industry and tended to confirm the validity of our approach to estimating damages.

On March 22nd and March 23rd, Professor Harrison was present at the Analytics, Inc. offices in Excelsior, Minnesota, to assist me in reviewing, critiquing and otherwise analyzing all of the materials obtained to date. At meetings at Analytics, Inc. on March 22nd and March 23rd, attended by Mr. Jack L. Chestnut, all of the damage theories heretofore mentioned were further reviewed and analyzed in the context of their accuracy, conformity to liability issues, and realism. At that point, it was decided to review these findings with other members of the Plaintiffs' Settlement Justification Committee.

A conference call was scheduled for March 26, 1979, with members of this Committee to review the general findings and conclusions. At the same time, various problems with regard to data collection were discussed and solutions for correcting deficiences were proposed. This call was followed by another conference call on March 29th with the same individuals to confirm the progress being made. On April 4, 1979, a meeting was held in Washington, D.C. to review my conclusions with counsel for designated class representatives who had supported the settlements. At that meeting, it was decided to send all defendants a request for written verification of the data submitted pursuant to the settlement justification investigation.

III. *The Data.*

The necessary data to complete the above described analysis are sales of corrugated materials by the Settling Defendants and the resulting net profits from the sale of those products. The yearly net dollar sales of corrugated materials (gross sales of corrugated materials less returns and allowances), as represented by all Settling Defendants' records from 1970 through 1978, are summarized in Table 1. These sales figures reflect net sales less sales to other defendants and intra-company sales to the extent such information was available.

Defendants' net profits as a percent of net sales of corrugated material are also summarized in Table 1. Net profits are defined as the difference between the net sales of corrugated materials and cost of goods sold, fixed costs, and administrative expenses, prior to payment of federal and state income taxes.

Complete data for all Settling Defendants were available for the years 1970-1978 inclusive. Only scattered data before 1970 have been achieved. Record keeping procedures, changes in accounting methods, and conver-

sion to computer operations or from one mode of computer operations to another, are among the factors which have prevented Settling Defendants from being able to furnish sufficiently complete pre-1970 information.

IV. *Estimate of Overcharge.*

The during-and-after approach to estimating the overcharge was used for the following reasons. Plaintiffs' counsel's investigations indicate that the conspiracy to fix prices in the corrugated containers industry occurred as early as 1960 and continued at least until the Federal grand jury investigation began in December, 1975. Consequently, any attempt to use the 1960-1975 time period as a normative basis for price or profit comparisons would also incorporate the alleged anti-competitive pricing activity. However, to the degree that the grand jury investigation caused the elimination of the illegal conduct previously practiced, a comparison of defendants' profits during 1976-1978 with those earned in a reasonable time prior to the cessation of the illegal pricing policies provides a good basis for estimating the overcharge.

The civil suit was filed in March, 1977. Because damages cannot be claimed for more than four years prior to that time, unless the statute of limitations is tolled, I was directed by plaintiffs' counsel to use a four-year damage period assumption. It was next necessary to determine the during and after periods which reflect conspiratorial versus competitive conduct in the corrugated containers industry. An argument can be made that, immediately after the grand jury investigation, all illegal activity ceased immediately. On this assumption, there would be 33 months of damages available to the class.[1] On the other hand, it is also possible that there

[1] Suit filed March, 1977. Time period begins April 1, 1973, runs through December, 1975.

was a lag between the beginning of the grand jury investigation and the cessation of alleged illegal pricing practices. If such a lag were assumed to be a year, the damage period would be 45 months.[2] One could also project a damages period encompassing the entire 48-months immediately prior to the civil suit filing in March, 1977. All of these assumptions, in conjunction with alternative time periods for conspiratorial profit percentages, were employed as a basis for the range of estimates of the overcharge made by Settling Defendants to the class, shown in Table 2 to be between $185,753,000 and $789,036,000.

FURTHER, AFFIANT SAITH NOT.

/s/ *Richard C. Hoyt*
RICHARD C. HOYT

STATE OF MINNESOTA
COUNTY OF HENNEPIN
Subscribed and sworn to before
me this 10th day of April,
1979, at Minneapolis, Minnesota.

/s/ [notary]

[2] April 1, 1973, through December, 1976.

TABLE 1

SETTLING DEFENDANTS' NET SALES OF CORRUGATED MATERIALS AND NET PROFITS AS A PERCENT OF SALES

Year	Net Sales of Corrugated Materials by Settling [1] Defendants ($000)	Net Profits of Corrugated Materials by Settling Defendants ($000) [2]	Net Profits As a Percent of Net Sales (%)
1970	$1,652,072	$ 4,061	.24
1971	1,724,160	[39,984]	[2.31]
1972	1,957,837	23,819	1.21
1973	2,473,658	180,187	7.28
1974	2,860,359	367,660	12.85
1975	2,866,171	180,839	6.30
1976	3,325,813	125,500	3.77
1977	3,406,056	38,800	1.13
1978	3,291,282	17,796	.54

1. Source: Documents and data supplied by Defendants. 1978 net sales includes estimate for International Paper.

2. Source: Documents and data supplied by Defendants. Includes estimates for Chesapeake, 1970, and CCA, 1978.

EXHIBIT C

	1977 Net Working Capital	1977 Net Income After Taxes
Alton Box Board Co.*	$ 29,006,988	$ 2,964,067
Boise Cascade Corporation**	275,129,000	115,610,000
Chesapeake Corp. of Virginia**	19,730,000	10,281,000
Consolidated Packaging Corp.*	(8,391,000)	(7,545,000)
Container Corp. of America**	187,913,000	55,765,000
The Continental Group**	321,800,000	143,800,000
Crown Zellerbach Corporation*	367,055,000	109,152,000
Diamond International Corporation**	164,745,000	46,927,000
Dura-Containers, Inc.***	6,302,853	1,211,802
Fibreboard Corporation*	26,741,000	6,451,000
Georgia-Pacific Corporation**	460,000,000	262,000,000
Green Bay Packaging, Inc.*** (1976)	20,576,884	8,884,214
Hoerner Waldorf Corporation/ Champion International**	444,466,000	138,615,000
Inland Container Corp.**	46,163,000	21,921,000
International Paper Company**	574,500,000	233,700,000
Interstate Container Corp.***	Not available	
Longview Fibre Co.**	24,490,000	27,518,000
MacMillan Bloedel Ltd.**	292,950,000	38,349,000
The Mead Corporation**	206,563,000	98,047,000
Menasha Corporation*	32,034,586	10,100,196 (net profit)
Olinkraft, Inc.**	46,717,000	34,596,000
Owens-Illinois, Inc.**	394,175,000	91,304,000
Packaging Corp. of America*	3,408,931	21,696,617
Potlatch Corporation**	108,073,000	61,813,000
St. Joe Paper Co.***	18,834,388.89	23,792,000 (1975)
St. Regis Paper Company**	522,134,000	106,786,000
Southwest Forest Industries, Inc.**	83,863,000	16,086,000
Stone Container Corporation**	43,577,000	10,045,000
Union Camp Corporation**	203,539,000	114,664,000
U.S. Corrugated Fibrebox Co.***	3,897,820	Not available
Westvaco Corporation**	225,692,000	61,944,000
Weyerhaeuser Co.**	530,239,000	303,891,000
Willamette Industries, Inc.**	67,155,000	48,123,000

* Information for this company compiled from Dun & Bradstreet reports.

** Information for this company compiled from Moody's Industrial Manual.

*** Information for this company compiled from company financial statements.

EXHIBIT D
SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
Boise Cascade	$ 9,891,000.00	Texas Commerce—C.D.	10.75—Matures 8/27/79; Interest Due at Maturity
Champion/Hoerner Waldorf	$24,120,000.00	First City National	Escrow
Chesapeake Corporation of Virginia	$ 3,024,000.00	Texas Commerce—C.D.	11.15—Matures 6/26/79; Interest Due at Maturity
Container Corporation of America	$34,240,000.00	Texas Commerce	Escrow
Continental Group, Incorporated	$27,430,000.00	Texas Commerce	Escrow
Diamond International Corporation	$ 1,000,000.00	Texas Commerce—C.D.	11—Matures 6/19/79; Interest Due at Maturity
Dura Containers, Incorporated	$ 750,000.00	American Fletcher National Indianapolis, Indiana	Letter of Credit
Green Bay Packaging	$ 5,557,500.00	Texas Commerce	Escrow
Inland Container Corporation	$34,627,500.00	First City National	Escrow
International Paper Company	$ 8,300,000.00 (4,150,000.00)	Texas Commerce—C.D.	8.6—Matures 8/27/79; From inception until 1/25/79 money market certificates were purchased with the interest money received; As of 1/25/79 the interest received each month purchases another C.D. which expires on the same date as the original C.D.

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
	(4,150,000.00)	First City National—C.D.	8.7—Matures 8/28/79; Each month the interest received from the original C.D. purchases money market certificates
Longview Fibre Company	$ 6,450,000.00	Texas Commerce—C.D.	10.40—Matures 8/15/79; Interest Due at Maturity
MacMillan Bloedel, Incorporated	$ 8,440,000.00	Texas Commerce	Escrow
Menasha Corporation	$ 4,592,250.00	Texas Commerce	Escrow
Olinkraft, Inc.	$ 7,350,000.00	First City National	Escrow
Owens-Illinois, Incorporated	$32,700,000.00	First City National	Escrow
St. [illegible]e Paper Company	$12,468,750.00	Bank of the Southwest	Escrow
St. Regis Paper Company	$ 1,700,000.00	Texas Commerce Bank—C.D.	8.8—Matures 7/25/79; From inception until 1/25/79 money market certificates were purchased with the interest money received; As of 1/25/79 the interest received each month purchases another C.D. which expires on the same date as the original C.D.
Stone Container Corporation	$14,511,250.00	Texas Commerce	Escrow

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
Union Camp Corporation	$ 7,400,000.00		
	(1,300,000.00)	Great Southern—C.D.	11.1—Matures 7/26/79; Interest compounded monthly
	(1,000,000.00)	Southern National—C.D.	11.25—Matures 7/29/79; Interest compounded monthly
	(1,350,000.00)	East End State—C.D.	11.1—Matures 6/26/79; Each month the interest received from the original C.D. purchases another which expires on the same date as the original C.D.
	(1,750,000.00)	Allied Bank of Texas—C.D.	11.125—Matures 6/26/79; Each month the interest received from the original C.D. purchases another C.D. which expires on the same date as the original C.D.
	(2,000,000.00)	First City National—C.D.	11.15—Matures 6/26/79; Interest compounded monthly

EXHIBIT D—Continued

SETTLEMENT FUND CHART

SETTLING DEFENDANT	AMOUNT	BANK	INTEREST RATE
U.S. Corrugated Fibrebox Company	$ 3,069,120.00	Texas Commerce	Escrow
Weyerhaeuser Company	$39,150,000.00		
	(19,150,000.00)	Houston National	Escrow
	(20,000,000.00)	First International	Escrow
Willamette Industries, Inc., Western Kraft East, Inc., and Corco, Inc.	$11,286,000.00	Texas Commerce	Escrow

4/14/79

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A.No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL.
(C.A.No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A.No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER AND CROSS-CLAIM

Filed May 9, 1979

Defendant, Packaging Corporation of America ("PCA"), hereby moves the Court for leave to amend and supplement its Answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., to assert a Cross-Claim for contribution against Defendants, Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Cura-Containers, Inc., Green Bay Packaging, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Com-

pany, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U.S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company and Willamette Industries, Inc. (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the PCA Answer as of right has expired.

PCA would further show that this Motion for Leave requesting leave to assert a Cross-Claim is in substance the same as that heretofore filed by Westvaco Corporation on or about February 27, 1979, and that as shown by Westvaco Corporation's Motion for Leave, counsel for that company conferred in person by telephone with counsel for each of the Settling Defendants and counsel for Plaintiffs (Chairman of Plaintiffs' Steering Committee), and was uniformly informed by said counsel that they intended to oppose such Motion. Subsequent to that time, twenty-three (23) of the Settling Defendants and Plaintiffs have filed written opposition to said Motion. The Motion here made by PCA seeking contribution is in substance identical with that heretofore filed by Westvaco Corporation and, under such circumstances, PCA respectfully shows the Court that the personal conference required by the rules of this Court prior to filing this Motion would and will, without doubt, meet with the uniform opposition of the Settling Defendants and Plain-

tiffs and, under such circumstances, makes unnecessary such personal conferences.

DATED: May 9, 1979

/s/ *Preston Shirley*
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[Certificate of Service omitted]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS IDENTIFIED
IN EXHIBIT A HERETO

AMENDED AND SUPPLEMENTAL ANSWER OF PACKAGING CORPORATION OF AMERICA TO THE UNIFIED COMPLAINT AND ITS CROSS-CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

Packaging Corporation of America (hereinafter called "PCA") respectfully makes and files this its Amended and Supplemental Answer to the Unified and Consolidated Complaint and Its Cross-Claim, and as grounds therefor would show the Court as follows:

PCA adopts each and every defense heretofore set forth in its "Answer and Jury Demands of Packaging Corporation of America to Unified and Consolidated Complaint," heretofore filed on or about June 30, 1978, together with the prayer for relief contained therein and, in addition, now supplements and amends said Answer by the addition of its "Cross-Claim Against Settling Defendants," reading as follows:

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

(1) Each of the corporations named in this paragraph are Defendants in the *Corrugated Container Antitrust*

Litigation, MDL 310, having been named as Defendants in the Consolidated Complaint, and having been named as Defendants in one or more of the predecessor complaints in the consolidated actions. Each of these corporate Defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
St. Regis Paper Company	New York
Stone Container Corporation	Illinois
Union Camp Corporation	Virginia
U.S. Corrugated-Fibre Box Company	Indiana
Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

(2) The Defendant corporations named in Paragraph 1 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of action alleged in the complaint which Settlements are being submitted to the Court for approval.

(3) Under the terms of the Settlements, Plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and to permit these actions to proceed against all other defendants (Non-Settling Defendants) including PCA.

(4) With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

(5) In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against PCA, then PCA is entitled to receive appropriate contributions from the Settling Defendants.

(6) By entering into the Settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to PCA, as alleged in Paragraph 5 above, in the unlikely event Plaintiffs, after trial, should obtain a judgment against PCA.

WHEREFORE, Packaging Corporation of America prays as heretofore prayed in its Answer to the Unified and Consolidated Complaint and, in addition, in the event of any judgment against it, prays for judgment over and against the Settling Defendants for (1) their respective appropriate contributions to PCA in the event there is any liability to Plaintiffs by PCA; (2) costs and disbursements of this Cross-Claim, including reasonable

attorneys' fees; and (3) such other and further relief as this Court may deem just and proper.

DATED: May 9, 1979

/s/ *Preston Shirley*
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EXHIBIT A

ACTIONS INCLUDED IN DEFENDANT'S ANSWER TO THE UNIFIED COMPLAINT

	Action	Civil Action Docket Number	District
1.	Adams Extract Co.	H-77-461	S.D. Texas
2.	After Six, Incorporated	H-77-805	S.D. Texas
3.	The Amberley Greeting Card Company	H-78-56	N.D. Ill.
4.	Andre-Boudin Bakeries, Inc.	H-78-53	N.D. Calif.
5.	Arcadia Furniture Corporation	H-77-790	S.D. Texas
6.	Artcraft Press, Inc.	H-77-2147	D. Minn.
7.	Austin Products Co.	H-77-782	S.D. Texas
8.	The Beaumont Company	H-78-11	S.D. N.Y.
9.	Bodines, Inc.	H-78-64	N.D. Ill.
10.	Carron Manufacturing Company	H-78-60	N.D. Ill.
11.	Co-ordinated Industries, Inc.	H-78-58	N.D. Ill.
12.	Covington Fabrics Corp.	H-78-10	S.D. N.Y.
13.	Denver Meat Company	H-77-1934	S.D. Texas
14.	Doranne of California, Inc., d/b/a Embassy Giftwares	H-77-724	S.D. Texas
15.	Douglas Furniture Corp.	H-78-54	N.D. Ill.
16.	Erie Seating Co.	H-78-68	N.D. Ill.
17.	Furniture Plastics, Inc.	H-78-59	N.D. Ill.
18.	Grist Mill Co.	H-77-849	S.D. Texas
19.	Haeger Potteries, Inc.	H-77-1457	S.D. Texas
20.	I. Kaplan, Inc.	H-78-375	E.D. Pa.
21.	Land O'Lakes, Inc.	H-78-170	D. Minn.
22.	Levee Furniture Company	H-77-793	S.D. Texas
23.	Northland Aluminum Products, Inc.	H-78-171	D. Minn.
24.	Marathon Enterprises, Inc.	H-77-584	S.D. Texas
25.	Red Wing Industries, Inc.	H-77-804	S.D. Texas
26.	Salsburg Meats, Inc.	H-78-67	N.D. Ill.
27.	Sambo's Restaurants, Inc.	H-78-63	N.D. Ill.
28.	Shell-Tex Fisheries, Ltd.	H-77-876	S.D. Texas
29.	Snyder-Craft Co., Inc.	H-78-65	N.D. Ill.
30.	Tierra Royal Potteries, Inc.	H-77-2168	D. Kansas
31.	Town House Furniture Ltd.	H-78-69	N.D. Ill.
32.	Universal Cooperatives, Inc.	H-77-885	S.D. Texas
33.	Valley Avocado Sales, Inc.	H-77-869	S.D. Texas
34.	Valley Plastics, Inc.	H-77-792	S.D. Texas
35.	West Publishing Company	H-77-791	S.D. Texas
36.	Westside Paper Company	H-78-48	C.D. Calif.
37.	Williams Manufacturing Company	H-77-789	S.D. Texas
38.	Winona Industries, Inc.	H-77-814	S.D. Texas
39.	Wittek Golf Supply Co., Inc.	H-78-55	N.D. Ill.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

MOTION OF DEFENDANT GEORGIA-PACIFIC CORPORATION FOR LEAVE TO FILE AMENDED ANSWERS AND CROSS-CLAIMS

Filed May 10, 1979

Defendant Georgia-Pacific Corporation (hereinafter, "Georgia-Pacific") hereby moves the Court, pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure, for leave to amend its answers on file in MDL No. 310 to assert: (1) an additional affirmative defense, and (2) cross-claims for contribution in each action in which Georgia-Pacific has been named and served as a defendant.

The proposed additional defense and cross-claims to be added to the answers filed in each of the actions in which Georgia-Pacific has been named and served would allege the following:

[*Next Number in Sequence*] *DEFENSE*

[¶] The claims for damages, and any damages found recoverable thereunder, against defendant Georgia-Pacific by plaintiff(s), or any member of

any class represented by plaintiff(s), must be reduced by that portion of such damages appropriately allocable to any person with whom such plaintiff(s) or class member has settled, or hereafter does settle, its claims. Further, to the extent that plaintiff(s), or any member of any class represented by plaintiff(s), has entered, or hereafter does enter, into any settlements with other manufacturers of corrugated containers or sheets, plaintiff(s), or any member of any class represented by plaintiff(s), has waived, or will waive, that portion of its claim for damages appropriately allocable to said settling manufacturer.

CROSS-CLAIM

[¶] The within cross-claim is brought by defendant Georgia-Pacific pursuant to Rule 13 of the Federal Rules of Civil Procedure.

[¶] Plaintiff(s) in the Complaint [Amended Complaint, etc.; hereinafter, "the Complaint"] herein assert, *inter alia*, joint and several liability against Georgia-Pacific and the other defendants named in the Complaint for alleged participation in a purported combination and conspiracy in violation of federal antitrust laws with respect to corrugated containers and sheets, as those terms are defined in the Complaint. Georgia-Pacific has denied, and continues to deny, the material allegations of the Complaint insofar as they purport to refer or relate to Georgia-Pacific.

[¶] Plaintiff(s) further assert, *inter alia*, that certain other persons not named as defendants, and not otherwise identified, also participated in the purported combination and conspiracy alleged in the Complaint. The identities of any such alleged co-conspirators are presently unknown to Georgia-Pacific and cannot presently be determined. Georgia-

Pacific reserves the right to file third-party actions, or otherwise appropriately assert claims, for contribution against any such alleged co-conspirators as may hereinafter be identified.

[¶] In the unlikely event that plaintiff(s) and/or any member of any class represented by plaintiff(s) recover(s) a judgment in this action against Georgia-Pacific on the basis that Georgia-Pacific engaged or participated in a combination or conspiracy in violation of the federal antitrust laws, Georgia-Pacific is entitled to contribution, on such basis as may be proper under the law and facts, from any person with whom such plaintiff(s) or class member has settled, or hereafter may settle, its claims [hereinafter, "settling defendant"], to the extent Georgia-Pacific must satisfy, in whole or in part, any such judgment. In such circumstances, any settling defendant is liable to Georgia-Pacific for all or part of any portion of any such judgment that must be satisfied by Georgia-Pacific. Further, in such unlikely event, Georgia-Pacific also may be entitled to claim contribution from other persons, including defendants other than settling defendants, and Georgia-Pacific reserves the right to assert such claims at a later time.

In addition, the prayer for relief in each answer filed on behalf of Georgia-Pacific in MDL No. 310 would be amended to provide as follows:

WHEREFORE, Defendant Georgia-Pacific Corporation prays for judgment as follows:

(1) that plaintiff(s), and/or any member of any class represented by plaintiff(s), take nothing as to Georgia-Pacific by the Complaint;

(2) that judgment be entered dismissing the Complaint with prejudice as to Georgia-Pacific;

(3) that Georgia-Pacific be awarded its costs of this action together with reasonable attorneys' fees;

(4) that judgment be entered in favor of Georgia-Pacific as to its cross-claims herein, granting, if plaintiff(s) or any member of any class represented by plaintiff(s) recover(s) a judgment against Georgia-Pacific, contribution against each and every settling defendant for any amount by which that portion of the judgment that must be satisfied by Georgia-Pacific exceeds Georgia-Pacific's appropriate share, as determined under such basis for contribution as may be proper under the law and facts, of the aggregate damages awarded to plaintiff(s) or any class member; and

(5) that the Court order such other, further, and different relief as may be just and proper.

This motion is made upon the grounds that justice so requires in order that all issues among the parties may be fully litigated in this action.

A proposed form of Order is attached to this Motion.

Dated: May 9, 1979

Respectfully submitted,

ECKERT, SEAMANS, CHERIN & MELLOTT

By /s/ *Cloyd R. Mellott*
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

PRETRIAL ORDER NO.

Defendant Georgia-Pacific Corporation having moved for leave to amend its answers herein, and it appearing to the Court that, pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure, such leave should be granted,

IT IS HEREBY ORDERED, that Defendant Georgia-Pacific is hereby granted leave to amend its answers substantially in the form specified in its Motion for Leave to File Amended Answers and Cross-Claims, dated May 9, 1979.

Decided: May __, 1979

_____
United States District Judge

[Certificate of Service omitted]

IN THE DISTRICT COURT OF THE UNITE STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL Docket No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

OBJECTIONS OF CERTAIN ACTIVE AND RESERVE CLASS REPRESENTATIVES TO PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENTS

* * * *

* * * 376 F.2d 206, 211 (8th Cir. 1967); and *Bray* v. *Safeway Stores, Inc.*, 392 F.Supp. 851, 864 (N.D.Cal. 1975)

Herein, comparison of price levels prevailing during the last four years of the conspiracy (1974-1977) with the price level prevailing following termination of the conspiracy in January of 1978 dramatically demonstrates the severe impact which the conspiracy had upon the prices paid by class members for corrugated containers and sheets. Comparison of the price levels prevailing during the conspiracy period 1974 to 1977 and the price levels which would have prevailed during that period absent the conspiracy reveals class-wide single damages for the period 1974-1977 of $1.972 billion on defendants' sales and an average price overcharge for that period of 11.2%. See *Report and Affidavit of Professor Albert Madansky*, Appendix B hereto. The same analysis reveals class-wide single damages on settling defendants' sales of $1.395 billion. The settlements before this Court therefore amount to only 15.1% of single damages on defendants' sales during the period 1974-1977 and to only 21.4% of single damages on settling defendants' sales during the period 1974-1977.

Professor Madansky's price study also dramatically demonstrates the gradual dissipation of the conspiracy and its effect on prices between June of 1977 and March of 1978 as evidenced by a significant drop in corrugated prices during that period.

VIII.

THE RISK OF "ILLINOIS BRICK LEGISLATION" IS DE MINIMIS

In arguing that the risk of "*Illinois Brick* Legislation" poses a real threat to direct purchaser recovery, proponents of the proposed settlements fail to note that similar *Illinois Brick* legislation was introduced and * * *

* * * *

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS EXCEPT THOSE
IDENTIFIED ON EXHIBIT II
ANNEXED TO THE UNIFIED AND
CONSOLIDATED COMPLAINT AND

DRAPER-KING COLE, INC., ET AL.
(C.A.No. H-78-1226)
FRANKLIN CONTAINER CORP., ET AL
(C.A.No. H-78-671)
IOWA BEEF PROCESSORS, INC.
(C.A.No. H-78-1263)

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-CLAIM

Filed May 21, 1979

Defendant, Packaging Corporation of America ("PCA"), hereby moves the Court for leave to amend its Answer pursuant to Rules 13(g) and 15(a), Fed. R. Civ. P., and to assert a Cross-Claim for contribution against Defendants, Boise Casade Corporation, Champion International Corporation, The Chesapeake Corporation of Virginia, Container Corporation of America, The Continental Group, Inc., Corco, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packag-

ing, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Company, Longview Fibre Company, MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U. S. Corrugated-Fibre Box Company, Western Kraft East, Inc., Weyerhaeuser Company and Willamette Industries, Inc. (hereinafter referred to collectively as the "Settling Defendants") in the form attached as an appendix hereto, on the ground that justice so requires in order that all issues between the parties may be fully and efficiently litigated in this action.

This motion does not violate any limitation on time for filing imposed by the Local Court Rules of this Court or any special order of this Court in this litigation but the time for amending the PCA Answer as of right has expired. This motion further is made at such time as to not cause any delay in the prosecution of this cause and development of the evidence in this cause and is timely made and presented.

PCA would further show that this Motion for Leave is in substance the same as that heretofore filed by Westvaco Corporation on or about February 27, 1979, and that as shown by Westvaco Corporation's Motion for Leave, counsel for that company conferred in person by telephone with counsel for each of the Settling Defendants and counsel for Plaintiffs (Chairman of Plaintiffs' Steering Committee), and was uniformly informed by said counsel that they intended to oppose such Motion. Subsequent to that time, twenty-three (23) of the Settling Defendants and Plaintiffs have filed written opposition to said Motion and in open Court opposed the granting of such Motion. The Motion here made by PCA is in substance identical with that heretofore filed by

Westvaco Corporation and, under such circumstances, PCA respectfully shows the Court that the personal conference required by the rules of this Court prior to filing this Motion would, will and has met with the uniform opposition of the Settling Defendants and Plaintiffs and, under such circumstances, makes unnecessary such personal conferences.

DATED: May 17, 1979

/s/ *Preston Shirley*
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IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS IDENTIFIED
IN EXHIBIT A HERETO

AMENDED ANSWER OF PACKAGING CORPORATION OF AMERICA TO THE UNIFIED COMPLAINT AND ITS CROSS-CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

Packaging Corporation of America (hereinafter called "Defendant") hereby makes and files its Amended Answers to the Unified and Consolidated Complaint (hereinafter called "Unified Complaint") and separately for and to each and every civil action identified in Exhibit A attached hereto, but in one set of papers for the convenience of the Court and the parties. Defendant does so pursuant to and in accordance with Pretrial Order No. 4 and the clarification of the Unified Complaint set forth in the Stipulation between the parties incorporated therein. The inclusion of these Answers in a single document shall not affect the remand of any action transferred to this Court for coordinated pretrial purposes.

In support of its Answers, Defendant says as follows:

I.

FIRST DEFENSE

Defendant's actions have been lawful, and Plaintiffs have not suffered any injury to their business or property by reason of any act or omission of Defendant.

II.

SECOND DEFENSE

The Unified Complaint fails to state a claim upon which relief can be granted.

III.

THIRD DEFENSE

Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations and by Plaintiffs' laches.

IV.

FOURTH DEFENSE

This action fails to satisfy the requirements of Rule 23, Fed. R. Civ. P., and may not be maintained as a class action.

V.

FIFTH DEFENSE

Defendant responds to the correspondingly numbered paragraphs of the Unifed Complaint as follows:

1. Defendant admits that the Unified Complaint purports to be filed pursuant to a certain order of the Court and purports to amend certain complaints identified in

Exhibit I to the Unified Complaint. Defendant avers the purpose and effect of the Unified Complaint is set forth in the Stipulation between the parties incorporated in Pretrial Order No. 4.

2. Defendant admits that each of the actions identified in Exhibit A purports to arise under Section 1 of the Sherman Act, but denies the remaining allegations of paragraph 2.

3. Defendant admits that jurisdiction purports to be based on certain cited statutes, but denies the remaining allegations of paragraph 3.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 as to other Defendants. As to those actions identified in Exhibit A attached hereto, Defendant admits that it maintains an office or plant, transacts business, is found, or has an agent within the district wherein each such action was commenced. Defendant denies the remaining allegations of paragraph 4, and moves to strike all references in paragraph 4 to other litigation, to other districts and to 28 U.S.C. § 1407.

5. Defendant admits the allegations of paragraph 5.

6-7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6 and 7.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 as to other Defendants. Defendant admits that it is incorporated under the laws of the State of Delaware, that it has a principal place of business in Evanston, Illinois, and that during all or part of the period covered by this Unified Complaint it has manufactured and sold corrugated containers and corrugated sheets in certain geographical areas in the United States.

Defendant denies the remaining allegation of paragraph 8.

9-10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9 and 10.

11. Defendant admits that the principal office of the Fibre Box Association is in Chicago, Illinois, but denies the remaining allegations of paragraph 11.

12. Defendant denies the allegations of paragraph 12.

13. Defendant admits that Plaintiffs purport to bring these actions as class actions, but denies the remaining allegations of paragraph 13.

14. Paragraph 14 purports to define corrugated containers and therefore does not require a response; but Defendants avers that paragraph 14 does not, in all respects, reflect a generally accurate definition.

15. Defendant is without knowledge or information sufficient to form a belief as to whether corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Defendant admits each and every other allegation of paragraph 15, except denies that corrugated containers are used solely as shipping containers.

16. Defendant admits that it has sold corrugated containers and corrugated sheets in certain geographical areas of the United States during all or part of the time period covered by this Unified Complaint. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 as to other Defendants.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 as to other Defendants. Defendant admits that it has sold and shipped corrugated containers

and corrugated sheets to certain customers located outside of the states of manufacture and that certain materials used by Defendant in manufacturing corrugated containers and corrugated sheets were shipped into the states of manufacture. Defendant denies the remaining allegations of paragraph 17.

18-22. Defendant denies each and every allegation of paragraphs 18 through 22.

23. Defendant is without knowledge or information sufficient to form a belief as to purchases, if any, by Plaintiffs or others. Defendant denies the remaining allegation of paragraph 23.

24. Defendant denies the allegations of paragraph 24.

VI.

SIXTH DEFENSE

By virtue of the settlements entered into between Plaintiffs and other Defendants, Plaintiffs have waived that portion of their claim for damages fairly allocable to the Settling Defendants, and have in substance settled that portion of any cause of action and damages fairly allocable to the Settling Defendants. Under such circumstances, while denying that any cause of action exists against it, Defendant asserts that, in any event, exclusion of the Settling Defendants' share of the market is required.

CROSS-CLAIM AGAINST SETTLING DEFENDANTS

(1) Each of the corporations named in this paragraph are Defendants in the *Corrugated Container Antitrust Litigation*, MDL 310, having been named as Defendants in the Consolidated Complaint, and having been named as Defendants in one or more of the predecessor

complaints in the consolidated actions. Each of these corporate defendants at all times mentioned in the complaint and in this answer were and are corporations duly organized under the laws of their respective states of incorporation as listed below.

Name of Defendant	State of Incorporation
Boise Cascade Corporation	Delaware
Champion International Corporation	New York
The Chesapeake Corporation of Virginia	Virginia
Container Corporation of America	Delaware
The Continental Group, Inc.	New York
Corco, Inc.	Ohio
Diamond International Corporation	Delaware
Dura-Containers, Inc.	Delaware
Green Bay Packaging, Inc.	Wisconsin
Hoerner Waldorf Corporation	Delaware
Inland Container Corporation	Indiana
International Paper Company	New York
Longview Fibre Company	Delaware
MacMillan Bloedel, Inc.	Alabama
MacMillan Bloedel Containers, Inc.	Delaware
Menasha Corporation	Wisconsin
Olinkraft, Inc.	Delaware
Owens-Illinois, Inc.	Ohio
St. Joe Paper Company	Florida
St. Regis Paper Company	New York
Stone Container Corporation	Illinois
Union Camp Corporation	Virginia
U.S. Corrugated-Fibre Box Company	Indiana
Western Kraft East, Inc.	Oregon
Weyerhaeuser Company	Washington
Willamette Industries, Inc.	Oregon

(2) The Defendant corporations named in Paragraph 1 hereof ("the Settling Defendants") have entered into proposed settlements ("Settlements") of the cause of

action alleged in the complaint which Settlements are submitted to the Court for approval.

(3) Under the terms of the Settlements, Plaintiffs and the Settling Defendants are requesting the Court to dismiss the complaint against the Settling Defendants and to permit these actions to proceed against all other defendants (Non-Settling Defendants) including Packaging Corporation of America (PCA).

(4) With the possible exception of the Settling Defendants, the said *Corrugated Container Antitrust Litigation*, MDL 310, as alleged in the complaints is continuing against the Non-Settling Defendants therein.

(5) In the unlikely event that at the conclusion of the said *Corrugated Container Antitrust Litigation* judgment in an amount presently unknown should be entered against PCA, then PCA is entitled to receive appropriate contributions from the Settling Defendants.

(6) By entering into the Settlements, the Settling Defendants are attempting to avoid their obligations to make appropriate contributions to PCA, as alleged in Paragraph 5 above, in the unlikely event Plaintiffs, after trial, should obtain a judgment against PCA.

WHEREFORE, having fully answered each and every action included in the Unified Complaint, Defendant prays that this Honorable Court enter judgment:

(1) Dismissing the Unified Complaint and each and every action identified in Exhibit A hereto with prejudice;

(2) Striking from the Complaint that language identified in paragraph 4 of this Answer;

(3) Denying Plaintiffs any of the relief for which they pray against Defendant;

(4) Denying that this action can be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P.;

(5) Granting Defendant such other and further relief as the Court may deem just and proper, including Defendant's attorneys' fees, costs and other expenses.

(6) Defendant further prays, in the alternative, that in the event any judgment be rendered against it, it have judgment over against the Settling Defendants for contribution against Settling Defendants and for costs and disbursements of this Cross-Claim, including reasonable counsel fees and for such other and further relief as this Court may deem just and proper.

DATED: May 17, 1979

/s/ *Preston Shirley*
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EXHIBIT A

ACTIONS INCLUDED IN DEFENDANT'S ANSWER TO THE UNIFIED COMPLAINT

	Action	Civil Action Docket Number	District
1.	Adams Extract Co.	H-77-461	S.D. Texas
2.	After Six, Incorporated	H-77-805	S.D. Texas
3.	The Amberley Greeting Card Company	H-78-56	N.D. Ill.
4.	Andre-Boudin Bakeries, Inc.	H-78-53	N.D. Calif.
5.	Arcadia Furniture Corporation	H-77-790	S.D. Texas
6.	Artcraft Press, Inc.	H-77-2147	D. Minn.
7.	Austin Products Co.	H-77-782	S.D. Texas
8.	The Beaumont Company	H-78-11	S.D. N.Y.
9.	Bodines, Inc.	H-78-64	N.D. Ill.
10.	Carron Manufacturing Company	H-78-60	N.D. Ill.
11.	Co-ordinated Industries, Inc.	H-78-58	N.D. Ill.
12.	Covington Fabrics Corp.	H-78-10	S.D. N.Y.
13.	Denver Meat Company	H-77-1934	S.D. Texas
14.	Doranne of California, Inc., d/b/a Embassy Giftwares	H-77-724	S.D. Texas
15.	Douglas Furniture Corp.	H-78-54	N.D. Ill.
16.	Erie Seating Co.	H-78-68	N.D. Ill.
17.	Furniture Plastics, Inc.	H-78-59	N.D. Ill.
18.	Grist Mill Co.	H-77-849	S.D. Texas
19.	Haeger Potteries, Inc.	H-77-1457	S.D. Texas
20.	I. Kaplan, Inc.	H-78-375	E.D. Pa.
21.	Land O'Lakes, Inc.	H-78-170	D. Minn.
22.	Levee Furniture Company	H-77-793	S.D. Texas
23.	Northland Aluminum Products, Inc.	H-78-171	D. Minn.
24.	Marathon Enterprises, Inc.	H-77-584	S.D. Texas
25.	Red Wing Industries, Inc.	H-77-804	S.D. Texas
26.	Salsburg Meats, Inc.	H-78-67	N.D. Ill.
27.	Sambo's Restaurants, Inc.	H-78-63	N.D. Ill.
28.	Shell-Tex Fisheries, Ltd.	H-77-876	S.D. Texas
29.	Snyder-Craft Co., Inc.	H-78-65	N.D. Ill.
30.	Tierra Royal Potteries, Inc.	H-77-2168	D. Kansas
31.	Town House Furniture Ltd.	H-78-69	N.D. Ill.
32.	Universal Cooperatives, Inc.	H-77-885	S.D. Texas
33.	Valley Avocado Sales, Inc.	H-77-869	S.D. Texas
34.	Valley Plastics, Inc.	H-77-792	S.D. Texas
35.	West Publishing Company	H-77-791	S.D. Texas
36.	Westside Paper Company	H-78-48	C.D. Calif.
37.	Williams Manufacturing Company	H-77-789	S.D. Texas
38.	Winona Industries, Inc.	H-77-814	S.D. Texas
39.	Wittek Golf Supply Co., Inc.	H-78-55	N.D. Ill.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310
(All Cases)

PRETRIAL ORDER NO. 13

Filed May 30, 1979

On May 16, 1979, a pretrial conference was held before the court, at which counsel were furnished an opportunity to present arguments, proposals, and comments to the court on the numerous motions pending. After giving careful consideration to all the memoranda, briefs, and arguments presented, the court enters the following orders:

1. Various non-settling defendants have filed motions for leave to file cross-claims for contribution against settling defendants. This question has been very thoroughly briefed by all concerned and the court has concluded that these motions should be DENIED. The reasons for this decision are set forth in the attached memorandum, which is incorporated herein. All cross-claims for contribution which have been filed are dismissed with prejudice; and there being no just reason for delay, this decision is entered as a final judgment pursuant to Rule 54(b), F.R.C.P.

2. Various non-settling defendants have requested leave to file amended or supplemental answers which would set forth as an affirmative defense plaintiffs' waiver of so much of their total claim as could be fairly allocated to the settling defendants. The court finds no

rule of law that would prevent an injured plaintiff from recovering all his proven damages from any non-settling joint intentional tortfeasor, less the amounts actually paid in settlement by other joint tortfeasors. The cases dealing with negligent joint tortfeasors in other areas of law are not controlling. Therefore these motions are DENIED.

3. Mead's motion to decertify the "class and sub-class" as to non-settling defendants is DENIED.

4. Container Corporation's motion to decertify the sheet plant subclass and to exclude sheet plants from further class status is DENIED.

5. The motion of St. Joe Paper Company, joined in by various other settling defendants, that the sheet plant sub-class be merged with the container purchaser sub-class is DENIED at this time because of problems with allocation of the post-January 5, 1979 settlements between sub-classes. Should the sub-classes arrive at a resolution of these problems, this motion may be reurged.

6. Plaintiffs' motion for rehearing with respect to paragraph 11 of Pretrial Order No. 11 having been granted, and it appearing to the court that plaintiffs' joint objections to defendants' request for financial information from privately held plaintiff companies should have been sustained it is hereby ORDERED that Pretrial Order No. 11, paragraph 11 be modified to read, "plaintiffs' joint objection to defendants' request for documents number 15, requesting financial data on plaintiff companies not publicly held, is SUSTAINED."

7. Plaintiffs' motion for an order concerning videotape and telephone depositions is GRANTED as modified herein:

A. The parties shall be authorized, without further order, to record the deposition testimony of any witness by means of videotape, unless such recording shall be objected to by counsel representing the wit-

ness or any party not less than ten (10) days prior to the scheduled date of deposition. Absent such objection, the use of videotape equipment shall be governed by the following procedures:

(i). The deposition of any witness noticed by any party may be recorded on videotape so long as the testimony of each witness is also simultaneously recorded, and later transcribed, by an independent certified court reporter. The written transcript prepared by the reporter shall constitute the official record of the deposition.

(ii). The witnesses shall be first duly sworn on camera by an officer authorized to administer oaths.

(iii). The camera and all of the collateral videotape equipment used in any deposition shall be constructed and operating to current state-of-the-art standards and shall be utilized to record the depositions in a fair and objective manner; the videotape operator shall further certify to the court and to all counsel of that fact. The camera or cameras shall be focused primarily on the witness but the operator may, by switching camera from time to time, record the witness's counsel and examining counsel, as well as charts, photographs, or exhibits. Only the witness, his counsel, and the examining counsel shall be shown, except for scenes of all counsel to identify those present at the depositions. Zooming with the lens of the camera shall be avoided. No "close-up" shorts of the witness will be permitted; at least the head and upper body of the witness shall be visible whenever the witness is on camera.

(iv). The videotape operator shall furnish a sufficient number of microphones, of good quality, to enable the witness, his attorney, and each

attorney making objection and each attorney conducting direct or cross examination to be heard.

(v). No supplementary lighting shall be used. Videotaped depositions must be taken in rooms permanently fitted with lighting adequate to the needs of the videotape operator.

(vi). No attorney or party shall give any instruction to the videotape operator before or during the course of the depositions as to the techniques to be employed, other than to supply him with a copy of this order and discuss it with him, in the presence of at least one opposing counsel and the attorney for the deponent.

(vii). The videotape operator shall certify under oath that he has read and understands this order and that the proceedings have been recorded accurately and in compliance with the terms of this order and that the videotape accurately reflects such recordation.

(viii). The cost of producing the original videotape of a witness' entire deposition shall be borne by the party requesting the videotape of that witness, and one (1) copy on good quality tape shall be provided to opposing counsel without cost by the party requesting the videotape deposition and such copy shall be placed in the document depository of opposing counsel. The original videotape recording shall be preserved in the custody of the videotape operator in its original condition until further order from the court. Any party or witness may order an additional copy of the original videotape from the videotape operator at its own expense, but no copies shall be provided to anyone other than parties or the witness without prior court approval.

(j). Pretrial Order No. 6, Paragraph 20, is hereby amended to provide that videotapes shall be prepared for review promptly, as deposition transcripts must be.

B. In order to alert counsel as soon as practical to a possible invocation of Fifth Amendment privilege claim by a witness, and thus reduce the burden of time and expense on numerous counsel who might otherwise appear for a deposition of that witness, Pretrial Order No. 6, Paragraph 26, is hereby amended to provide that where counsel for a party knows that a noticed witness is represented by independent counsel, he shall also provide the plaintiffs with the name and address of such independent counsel within ten (10) days of receipt of notice. Prior to the taking of the deposition of any witness noticed by plaintiffs or defendants, the parties shall exercise their best efforts to ascertain whether such witness intends to refuse to answer questions which the witness anticipates may be asked at the deposition based on the assertion by the witness of his Fifth Amendment privilege against self-incrimination. Any party or counsel for a party who learns that a witness whose deposition has been noticed intends to refuse to answer based on the assertion of the privilege shall promptly notify the party requesting the deposition.

C. The parties may, in their discretion, take by means of telephone the deposition of any witness who has indicated that he intends to refuse to answer questions based on the assertion by him of his Fifth Amendment privileges against self-incrimination. The following procedures shall govern the taking of such telephonic depositions:

(i). Not less than seven (7) days prior to the date set for the deposition of a witness who has indicated that he will refuse on constitutional grounds to answer the questions that might be

put to him, any party may elect to take such deposition by means of telephone by notifying the witness (or his counsel, where known) and the liaison counsel for all parties of:

(a). the time and place where the court reporter will swear the witness and record the deposition; and

(b). the name, address and telephone number of the court reporter who will record the deposition.

(ii). Not less than twenty-four (24) hours before the time set for the deposition, counsel for any party may elect to participate therein telephonically by notifying the court reporter of his desire to do so and by providing the court reporter with the telephone number at which such counsel can be reached at the time of the deposition. No one other than the witness, his counsel, and the court reporter shall be physically present at the telephonic deposition.

(iii). The court reporter shall be responsible for setting up the telephone conference call to include all counsel who have indicated a desire to participate telephonically. Each party so participating shall bear his pro rata share of the cost of the conference call.

(iv). Any such telephonic deposition shall be conducted by means of a telephone conference call in a manner which permits the witness and his counsel, the court reporter, the designated representatives of plaintiffs' and defendants' counsel and any other counsel who has timely requested to participate in the proceedings. Any such deposition shall be simultaneously recorded in the presence of the witness by a certified court reporter who has sworn the witness and who listens to the questions over a speaker tele-

phone. During such deposition only one counsel shall speak at a time, and each attorney speaking shall identify himself each time he speaks. Failure of counsel to conduct themselves in such fashion will permit the court reporter to terminate the telephonic deposition. If a telephone connection of adequate quality cannot be maintained. [sic] The written transcript prepared by the reporter shall constitute the official record of the deposition. Counsel and the court reporter shall be permitted to tape record the telephonic deposition proceedings if they so desire, provided all counsel participating in the conference call and the person being deposed are advised the recording is being made and consent thereto.

(v). At any time prior to the deposition, the parties may submit to the court reporter in a sealed envelope any documents which they desire to be used in connection with the deposition. Counsel submitting documents shall also make available copies of such documents to the liaison counsel for all parties prior to the taking of such deposition. At the direction of counsel conducting the deposition, the reporter shall display such documents to the deponent, and provide copies to the deponent or his lawyer. The reporter shall keep the originals of all such documents together with the transcript of the deposition.

(vi). In the event that a deponent responds to any question (except as to his name and address) otherwise than by refusing to answer based on the assertion by him of his Fifth Amendment privilege against self-incrimination, counsel conducting the deposition may suspend the taking of the deposition and resume the deposition in person at an appropriate time and place, but on not less than twenty (20) days'

notice. Such suspension shall not be deemed an adjournment pursuant to Pretrial Order No. 6, paragraph 19. At the conclusion of the direct telephonic examination of any deponent asserting privilege, any counsel participating in the deposition who wishes to cross-examine the witness may either do so during the conference call or in person at a time and place to be specified by that counsel.

(vii). Any deposition taken by means of telephone in accordance with the provision of this Order shall have the same force and effect and may be used in the same manner as a deposition taken in person in accordance with the provisions of the Federal Rules of Civil Procedure.

D. (1) The parties shall, at their expense, produce their present employees at the times and places scheduled for their depositions in accordance with PTO No. 6, paragraph 10.

(2) The parties shall exercise their best efforts to produce their former employees (other than those who are now employed by a party) at the times and places scheduled for their depositions as specified in the notices of depositions filed by the plaintiffs and defendants. The party requesting the deposition of any such witness shall be responsible for paying the reasonable actual travel expenses (but not other expenses) of the witness, in addition to the statutory witness fee.

E. The deposition Attendance Order referred to in paragraph 15 of PTO No. 6 may be served upon a non-party witness by mailing a copy of same to such witness certified, return-receipt-requested and the signed receipt shall constitute proof of service. Service upon a witness presently employed by a defendant herein may be accomplished by serving said defendant.

8. The following briefing schedule shall apply to plaintiffs' motion regarding disclosure of materials in the government document depository:

Defendants and the United States shall have until May 24, 1979 to respond.

Plaintiffs shall have until May 31, 1979 to reply.

Individual witnesses shall have until June 1, 1979 to file any responses they wish the court to consider.

A hearing is hereby set for June 4, 1979 at 10:00 A.M. on this question.

9. Plaintiffs' motion for preliminary approval of class settlements with the following defendants is GRANTED: Boise Cascade, Champion International, Chesapeake Corporation of Virginia, Consolidated Packaging, Container Corporation of America, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper (as amended), Longview Fibre, MacMillan Bloedel, Menasha, Olinkraft, Owens Illinois, St. Joe Paper, St. Regis Paper (as amended), Stone Container, Union Camp, U. S. Corrugated Fibre Box, Weyerhaeuser, and Williamette. Attached hereto and made a part hereof are the court's findings of fact and conclusions of law with respect to these settlements.

10. The court having concluded that the settlements preliminarily approved by this order are fair and adequate and negotiated in good faith, at arm's length, and with authority, there appears no good cause for deposing Messrs. Susman, Montague, Hoyt, Robertson, and Harrison on those subjects. Further, the notice of depositions was not timely filed. For these reasons, the notice of depositions filed May 2, 1979, and the subpoenas relating thereto are hereby quashed.

DONE at Houston, Texas, this 30th day of May, 1979.

/s/ John V. Singleton, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310
(All Cases)

MEMORANDUM OPINION

Filed May 30, 1979

On May 16, 1979, a pretrial hearing was held before this court on the motions of Westvaco, Packaging Corporation of America, Georgia-Pacific, and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class. The question presented by these motions is whether, in an antitrust action such as this, contribution among defendants is proper. This question has been very thoroughly briefed and argued. It is the conclusion of the court, after careful consideration of all the arguments presented, that such a claim would not be proper in this case.

The threshold question is whether contribution should be allowed in any antitrust case brought under the federal laws. The Eighth Circuit, in the recent case of *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 1979-1 Trade Cas. ¶ 62,485 (8th Cir. 1979), has allowed contribution in an antitrust action; no other circuit has done so. In fact, the law has appeared uniformly contrary to the position advanced by Westvaco. *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 616 (3d Cir. 1960); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2

Trade Cas. ¶ 61,698 (D. Utah 1977); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N.D. Calif. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D. N.Y. 1969). In recent years, however, it is argued that a trend towards allowing contribution can be discerned. Two cases are currently on appeal before the Fifth Circuit which may clarify this point, *Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 78-1788, and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346; and it has been suggested that this court defer ruling on this question until it has the benefit of that clarification.

It is the court's conclusion, however, that contribution would be inappropriate in these cases even should it be proper in some federal antitrust cases, and for that reason the court will not delay its ruling.

It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is undisputable—the estimates of total damages in these cases range from just under two hundred million dollars to over one billion dollars, and of course any jury verdict would be subject to the trebling provisions of the Act. Twenty-three defendants, representing approximately 80% of the market, have entered into settlement agreements for a total sum of almost three hundred million dollars. Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. Movants here seek a means to insure that they will not be ultimately liable for more than their market share, or perhaps than their percentage of culpability, in the event they go to trial and lose.

On the other hand, the settling defendants and class plaintiffs urge that allowing contribution in any case

such as this will make settlements impossible to achieve and will thereby contribute to the already notorious complexity and unmanageability of antitrust cases. Defendants have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants. Further complications to the efficient management of a suit such as this would arise from the processing of the many possible cross-claims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of United States of America vs. International Paper, et al and United States of America vs. Boise Cascade, et al.; those cases involved the prosecution of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in *Professional Beauty Supply* that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. 1979-1 Trade Cas. ¶ 62,485 at 76,852.

In addition to the management problems such a rule would present, the court finds Westvaco's arguments unpersuasive in the context of intentional torts. The court notes that even in jurisdictions which allow contribution among joint tortfeasors it is usual to restrict such recovery to negligent joint tortfeasors. The deterrent policies underlying the Sherman and Clayton Acts would appear to be best served by retaining a rule which can result in any defendant found to have engaged in such intentional wrongful acts being held liable for the full sum of injuries caused by its acts and those of its partners. It must, of course, be borne in mind at all times that a defendant who is found not to be an intentional violator of the antitrust laws will not pay a penny in damages.

For these reasons, the court does not feel that contribution should be allowed in any such antitrust case as this. If, however, the rule were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross-claims now. The Supreme Court has listed three factors to consider on the retroactivity of a new rule of law: that it work a substantial change in law upon which parties may have relied; that its policy be furthered by retrospective application; and that such application not be unfair. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971). In applying these three factors to the case in hand, it is clear that a holding by this court now, or by the Fifth Circuit on the appeals before it, that

contribution claims are proper under federal antitrust law would be a substantial departure from existing law. If such a rule is ultimately effectuated, the policy behind it must be one of fairness to non-settling defendants; perhaps it could be argued that that policy would be favored by retrospective application, but in this court's view fairness does not require allowing non-settling defendants to participate in joint defense efforts and use information gained there against those who have chosen to settle, in reliance on the then current state of the law. As to the third factor it seems unfair to all parties to change the rules underlying settlement in so complex a case at this stage of the litigation. Settling defendants have paid three hundred million dollars to buy their peace. Almost a year has passed since the first settlement agreement was reached. The settling defendants, under the terms of their settlements, have been cooperating with class plaintiffs in their discovery. As has been mentioned, all defendants, at this court's request, participated in joint defense work. It would be inequitable to apply such a rule retroactively to this case.

For these reasons, the motions of the several non-settling defendants to amend their answers to assert cross-claims for contribution are DENIED.

DONE at Houston, Texas this 30th day of May, 1979.

/s/ *John V. Singleton, Jr.*
United States District Judge

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING PROPOSED SETTLEMENT AGREEMENTS

Filed May 30, 1979

On May 16, 1979, a hearing was held before the court to consider, inter alia, the preliminary approval of twenty-three settlement agreements entered into by representatives of the plaintiffs' class [1] and various defendants herein. The court had previously requested full information bearing on the reasonableness of the settlements and had received voluminous materials from both proponents and opponents. Based on a very thorough study of all these materials and on the knowledge of the corrugated

[1] The following settlements were entered into by representatives of both container purchasers and sheet plants, prior to the court's order creating two subclasses: St. Regis, International Paper, Union Camp, Boise Cascade, Chesapeake of Virginia, Diamond International, Longview Fibre, Dura Containers, Champion International, Menasha, and Willamette. The following were entered into on behalf of the container purchaser subclass: Olinkraft, Weyerhaeuser, Container Corp. of America, Stone, Owens-Illinois, St. Joe, Inland, Continental, MacMillam Bloedel, Green Bay Packaging, and U.S. Corrugated Fibre Box. The settlement with Consolidated Packaging was negotiated on behalf of both subclasses.

industry acquired by the court during the recent four-ten week trial of the cases brought by the United States against various members of the industry, the court has no hesitation in stating that these settlements are within the range of possible approval and that notice of them should be given to the class members.

While mindful of the fact that this determination is in no way a definitive or dispositive ruling on the settlements, the court has decided to make certain findings and conclusions for the record at this point. This is because there has been opposition to the settlements from various quarters, and it would appear to be in the interest of all parties and of the expeditious processing of this litigation to clarify the court's position at this time on several issues which have been raised in the settlement context.

This litigation is a consolidation of a large number of cases filed throughout the country alleging a price-fixing conspiracy on the part of various manufacturers of corrugated sheets and containers. The cases, which now number over fifty, were consolidated for pretrial purposes under 28 U.S.C. § 1407 by the Judicial Panel on Multidistrict Litigation and assigned to this court, apparently largely because the grand jury investigation into the alleged illegal activities was being conducted here. The litigation, now MDL-310, was consolidated here late in November, 1977. Immediately thereafter, the court ordered the creation of document depositories and organizing committees for plaintiffs and defendants.

In January, 1978, the grand jury returned indictments against fourteen of the thirty-seven corporations who are defendants in MDL-310, as well as twenty-six individual employees of various corrugated manufacturers. During the pendency of the cases brought by the United States, discovery was somewhat curtailed in MDL-310 to avoid any possible prejudice to the defendants in the criminal

cases. The court did order that the civil defendants turn over to the plaintiffs the nearly two million documents they had produced to the grand jury. In addition to this material, plaintiffs obtained copies of the documents designated by the government as potential trial exhibits. No depositions were conducted in MDL-310 until the criminal trial concluded in April, 1979, and written discovery was severely limited (as, for example, to the issue of class certification).

Nevertheless, MDL-310 was not left dormant during the pendency of the criminal proceedings. The Plaintiffs' Steering Committee, with the court's authorization,[2] began settlement negotiations on behalf of the class as defined in the complaint. In September, 1978 the court certified a class of direct purchasers of containers and sheets. Late in December, 1978, the court divided the purchaser class into two subclasses—sheet plants and the remainder of the original single class. Sheet plants are businesses that buy corrugated sheets from integrated companies such as the defendants and process them into boxes or other products which they then sell, in competition with the integrated companies. The order carving out a separate subclass of sheet plants was entered because there was some suggestion that a conflict could arise between the two groups, and because the court was not at that time familiar enough with the corrugated industry to be sure that such a conflict would not arise. It now appears clear that although differences may exist between the sheet plants and other corrugated purchasers, there are no inherent conflicts between them.

With this very simplified picture of the course of the litigation in mind, we can place the various proposed settlements chronologically. St. Regis, an unindicted civil defendant, was the first at $1.7 million. International

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[2] Pretrial Order No. 2, Para. 3, entered Dec. 7, 1977.

Paper, an indicted defendant who had pled nolo contendere to felony charges and who was a major corrugated manufacturer with just under 6% of the market, was the second at $8.3 million. Both these settlements occurred prior to class certification. The history of the negotiations has been described in some detail in papers filed with the court by the attorneys who participated in them. These settlements were clearly negotiated pursuant to court authority, with the concurrence of the entire Plaintiffs Steering Committee, in good faith, and at arms' length. They provided the class with a $10 million fund, without any reduction of the claim as against the remaining alleged joint tortfeasors; with protection against the possibility that the class would not be certified as well as the obvious protection against the possibility that plaintiffs would not prevail on the merits; and with significant concessions by International Paper as to discovery. These benefits clearly justify submission of these proposed agreements to the class for approval. It is true that these two settlements are relatively small compared with similar companies' settlements later on in the litigation. To deprive plaintiffs of the benefits of bargaining for early, ice-breaking settlements in exchange for reduced settlement amounts would be to invade the class attorneys' province and perhaps ultimately to do a serious disservice to the class.

The next nine proposed settlements were negotiated by the attorneys for designated class representatives, after class certification and before the creation of the subclasses. They were for a total sum of about $68.5 million and were entered into by defendants representing roughly 22% of the defendants' total corrugated market. One of the sheet plant plaintiffs, Great Northern, not at that time a designated representative, had filed on October 12 a motion to create a sheet plant subclass.

This motion, which was never opposed by any party, was not ruled on until December 26, 1978. These nine settlement agreements were entered into between October 12 and December 26. It has been urged by Great Northern that negotiations should not have been conducted pending a court ruling on its motion. For several reasons, this argument is unpersuasive. First, and perhaps most important, is the fact that no conflict has been demonstrated between the sheet plants and the rest of plaintiffs' class. The admitted differences—that sheet plants compete with the defendants in box sales, that they themselves may have participated in the alleged price-fixing activities as to boxes, that they desire injunctive relief as well as damages, and that their measure of damages may conceivably be different from other plaintiffs'—do not amount to a conflict such as would make a subclass necessary to protect the rights of the sheet plants. Many other groups can be identified within the main class, for any one of whom the measure of damages may differ: West Coast plaintiffs,[3] plaintiffs who bought only from indicted (or unindicted) defendants, plaintiffs who bought only before (or after) the statute of limitations period, and so forth. The court does not consider such differences among groups as any indication that these nine settlements are inherently unfair.

Second, the Plaintiffs' Steering Committee which negotiated these nine agreements contained an attorney for Atlas Container, a sheet plant, then a designated representative of the one class, and currently a designated representative of the sheet plant sub-class. The primary function of the subclassing procedure is to in-

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[3] The indictments did not allege that the virtually nationwide conspiracy operated on the West Coast. This is not, of course, proof positive of its absence, but gives rise to a reasonable doubt as to whether West Coast purchasers stand on identical footing to others.

sure that the court is made aware of the possibly varied rights of class members. Atlas's attorney participated in the negotiations of these nine agreements on behalf of his sheet plant client and joins in the motion preliminarily to approve them. He has opposed certain provisions of eleven settlements which immediately succeeded the creation of the subclass, and is apparently willing and able to make his client's position known to the court.

Third, the proposed settlements appear on their face and from the extensive materials documenting their reasonableness to be well within the range of fairness and adequacy and to provide sufficient benefits to all class members that the class should be given notice and an approval hearing be set. The settlements were negotiated with authority, at arm's length, and in good faith by experienced attorneys, and are supported by the great preponderance of the class representatives.

The next eleven settlements to be considered were entered into only by the container purchaser subclass. Defendants were predictably and understandably reluctant to enter into negotiations which could not possibly end their exposure to all class members. These settlements contain a compromise provision which is the source of disagreement among plaintiffs' counsel, namely that if the sheet plant subclass decided to participate in these settlements they might receive up to a fixed amount [4] or a pro rata share, based on total dollar purchases from each defendant, whichever is smaller. The container purchaser subclass retains the right to oppose any allocation to the sheet plants, and no allocation can be made without the court's approval. This provision, common to all eleven proposed settlements, has aroused opposition

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[4] The dollar amounts vary as to each defendant, and were fixed, as a result of the container purchaser subclass's expert's research, at what the container subclass considered to be a likely pro rata share.

from two different quarters—one container purchaser subclass representative [5] complains that the rest of the representatives are giving the sheet plants something for nothing, and both sheet plant representatives complain that they are not being given enough. In fact, the court finds no fault with the proposed settlements on either ground. The settlements total approximately $230 million, of which a maximum of $14 million could conceivably be allocated to the sheet plants. From the statements made in their supporting documentation and before the court, it is apparent that plaintiffs' counsel were attempting to increase the bargaining power of the container purchaser subclass by offering defendants a possible ultimate settlement of the entire case as against them. From the statements made by counsel for some of this group of settling defendants, it is clear to the court that this hope of total settlement is of value to them. Even if the container purchaser subclass retains only $216 million out of these proposed settlements, the court cannot see that this would be inadequate, unreasonable, or an abandonment of plaintiffs' attorneys' obligations to the class.

The objections of the sheet plant representative that they have not been allocated enough are similarly insubstantial. Nothing in these settlements binds the sheet plant subclass unless they choose to participate in lieu of negotiating settlements on their own.

Finally, a proposed settlement has been negotiated on behalf of both subclasses with Consolidated Packaging Corp. for $180,000 total. The amount of this settlement has been very materially influenced by the financial difficulties in which that defendant finds itself. The court

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[5] Six of the original forty-nine plaintiffs join in this opposition, and one member of the Plaintiffs' Steering Committee (whose client supports the settlements) has also voiced this objection.

is fully familiar with these difficulties from its presentence investigation following Consolidated's plea of *nolo contendere* in the misdemeanor case. The settlement appears to be within a reasonable range and occupies the unique position of being wholly unopposed. It is hereby given preliminary approval.

As to the appropriateness of all the settlements, there are a few other points the court would like to make clear. Although formal discovery has been curtailed, plaintiffs have had access to a great deal of information about the industry and the defendants,[6] and these proposed settlements cannot be considered uninformed or premature. There are many risks for plaintiffs in this litigation; the recent acquittal of all who went to trial in the cases brought by the United States serve to emphasize some of the problems, and there are others that apply peculiarly to these civil cases, such as class certification problems and the proposed *Illinois Brick* legislation. Plaintiffs' ultimate success is by no means assured.

There have been some disputes among plaintiffs' counsel as to the proper measure of damages. It is not new for plaintiffs (and their experts) to disagree on their projection of possible recovery. The total dollar amount of these proposed settlements is record-breaking, and is well within a range which should be submitted to the class members for their approval or objections.

DONE at Houston, Texas, on this 30th day of May, 1979.

/s/ *John V. Singleton, Jr.*
United States District Judge

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[6] The grand jury documents submitted by each defendant; the government's bill of particulars and designated trial documents; materials prepared by the Fibre Box Association; studies by Arthur Andersen & Co. and by their own experts; and materials furnished by early-settling defendants pursuant to their agreements.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310 (All Cases)

NOTICE OF APPEAL

Filed June 8, 1979

NOTICE IS HEREBY GIVEN, that Westvaco Corporation ("Westvaco"), one of the defendants in the above named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13 entered on the 30th day of May, 1979 in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution including Westvaco's cross-claims.

Dated: June 5, 1979

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
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[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

This Document Relates To:

ALL ACTIONS IN WHICH GEORGIA-PACIFIC
CORPORATION HAS BEEN NAMED AND
SERVED AS A DEFENDANT

NOTICE OF APPEAL

Filed June 11, 1979

NOTICE IS HEREBY GIVEN, that Georgia-Pacific Corporation, one of the defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13 entered on the 30th day of May, 1979 in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution including Georgia-Pacific's cross-claims.

Dated: June 7, 1979

ECKERT, SEAMANS, CHERIN & MELLOTT

By /s/ *Cloyd R. Mellott*
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Attorney-in-Charge for
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[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310

THIS DOCUMENT RELATES TO:

ALL ACTIONS IN WHICH PACKAGING
CORPORATION OF AMERICA HAS BEEN
NAMED AND SERVED AS A DEFENDANT

NOTICE OF APPEAL

Filed June 15, 1979

NOTICE IS HEREBY GIVEN, that Packaging Corporation of America, one of the Defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 1, Pretrial Order No. 13, entered on the 30th day of May, 1979, in this litigation as a final judgment pursuant to Rule 54(b) F.R.C.P. dismissing all cross-claims for contribution, including Packaging Corporation of America's cross-claims.

DATED: June 14, 1979

/s/ *Preston Shirley*
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(713) 488-8716

[Certificate of Service omitted]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

M.D.L. No. 310 (All Cases)

NOTICE OF APPEAL

Filed June 25, 1979

NOTICE IS HEREBY GIVEN, that Westvaco Corporation ("Westvaco"), one of the defendants in the above-named litigation, hereby appeals to the United States Court of Appeals for the Fifth Circuit from Paragraph 2 of Pretrial Order No. 13, entered on the 30th day of May 1979 in this litigation, denying all motions by non-settling defendants, including Westvaco's motion, for leave to file amended or supplemental answers asserting as an affirmative defense that plantiffs have waived that portion of their claims for damages fairly allocable to the settling defendants.

Dated: June 22, 1979

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM

By /s/ *Leslie H. Arps*
LESLIE H. ARPS
Attorneys for Defendant Westvaco
Corporation
919 Third Avenue
New York, New York 10022
(212) 371-6000

[Certificate of Service omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-2439

[DO NOT PUBLISH]

In Re CORRUGATED CONTAINER ANTITRUST LITIGATION

ADAMS EXTRACT COMPANY, ET AL.,
Plaintiffs-Appellees,

versus

ALTON BOX BOARD COMPANY, ET AL.,
Defendants,
WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
and GEORGIA-PACIFIC CORPORATION,
Defendants-Appellants,

BOISE CASCADE CORPORATION, ET AL.,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(October 30, 1979)

Before FAY, RUBIN and HATCHETT, Circuit Judges.

PER CURIAM:

This massive class action multi-party litigation is before us on an interlocutory basis with two questions being presented. The first question is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. The second question is whether an antitrust defendant may raise an affirmative defense of claim reduction. The district court answered both questions in the negative by denying motions to assert cross-claims for contribution and motions to amend answers by including the affirmative defense of claim reduction.

The question of the right of contribution under the federal antitrust laws has been answered by another panel of our court in Abraham Construction Corporation v. Texas Industries, Inc., —— F.2d —— (5th Cir. 1979). It was held that there is no such right.

We find that the second question dealing with claim reduction is not properly before us. Although the district court did enter an appropriate final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the cross-claims (right of contribution), it refused to do so as to the affirmative defense (claim reduction). Under these circumstances we have no jurisdiction to consider this issue.

The ruling of the district court on the motions to file cross-claims (right of contribution) is AFFIRMED. The appeal from the order denying the requests to amend various answers to include the affirmative defense (claim reduction) is DISMISSED for lack of jurisdiction.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	M.D.L. NO. 310
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS EXCEPT: FRANKLIN CONTAINER CORP., ET AL. (C.A. NO. H-78-671)	§	

AGREEMENT OF SETTLEMENT BETWEEN CONTAINER PURCHASER AND SHEET PLANT SUBCLASSES AND DEFENDANT PACKAGING CORPORATION OF AMERICA

WHEREAS, certain plaintiffs are prosecuting M.D.L. No. 310 now pending before the above-entitled Court (hereinafter "the Court") as a class action;

WHEREAS, the Court ruled in its Order filed on September 6, 1978 that these actions may proceed as a class action on behalf of the class as defined in said Order (hereinafter "the Certified Class");

WHEREAS, the Court ruled in paragraph 4 of Pretrial Order No. 7, filed on December 26, 1978, that the Certified Class shall consist of a Sheet Plant sub-class, as defined in said Order of December 26, 1978, and a Container Purchaser sub-class comprised of the remainder of the members of the Certified Class;

WHEREAS, plaintiffs have alleged that defendant Packaging Corporation of America (hereinafter "Settling Defendant") was a participant in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers and sheets and it has denied the material allegations of plaintiffs' complaints and raised certain affirmative defenses thereto;

WHEREAS, Settling Defendant, denying wrongdoing of any kind whatsoever, has nevertheless agreed to enter into

this Agreement of Settlement to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

WHEREAS, plaintiffs have conducted investigations into the facts of these cases, reviewed at length and analyzed the grand jury documents produced by the defendants, the government trial exhibits made available to plaintiffs, the testimony at trial of the companion criminal cases, certain grand jury and government interview transcripts produced by the government, and have conducted formal and informal investigations, including document and deposition discovery regarding the claims of the plaintiffs against Settling Defendant, and have concluded that a settlement with Settling Defendant in the amount and on the terms hereinafter set forth is in the best interests of plaintiffs and the Container Purchaser and Sheet Plant sub-classes;

NOW, THEREFORE, it is agreed by and among the undersigned that these class actions be settled and compromised with Settling Defendant, upon approval by the Court, after a hearing as provided for herein, without affecting any joint and several liability of any non-settling defendant for any of the acts complained of by plaintiffs in any of their complaints including, but not limited to, acts of Settling Defendant, on the following terms and conditions:

1. The undersigned counsel represent that they are fully authorized to enter into the terms and conditions of, and execute, this Agreement.

2. The undersigned agree to undertake their best efforts, including all steps and efforts contemplated by this Agreement, and any other steps and efforts which may become necessary by order of the Court or otherwise, to effectuate this Agreement and the settlement set forth herein.

3. For the purposes of this Agreement only, the undersigned agree that there shall be designated the following

Settlement Class in M.D.L. No. 310:

> All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers as defined in the Unified and Consolidated Complaint on file herein) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period of January 1, 1960 to January 25, 1978, except for the following persons who are not included in said Settlement Class:
>
> > Those persons included on the Amended Opt-Out List of Class Members, filed November 20, 1979 (the Court's Docket No. 1099), other than those persons who were permitted by the Court to withdraw their requests for exclusion and to be included in the Certified Class by its Orders made January 8, 1980 and February 15, 1980.

For the purposes of this Agreement, said Settlement Class shall consist of the following sub-classes:

(a) A Container Purchaser sub-class which shall be identical to the Container Purchaser sub-class as defined and established by the Court in its Pretrial Order No. 7, dated December 26, 1978; and

(b) A Sheet Plant sub-class which shall be identical to the Sheet Plant sub-class as defined and established by the Court in said Order.

4. The Container Purchaser sub-class and the Sheet Plant sub-class of said Settlement Class shall be represented by the class representatives designated by the

Court in its Order dated October 26, 1978, as modified by the Court's Pretrial Order No. 7, dated December 26, 1978, or as may be otherwise ordered by the Court, who have entered into this Agreement.

5. In full and complete settlement of the claims asserted in these class actions by the members of the Settlement Class against Settling Defendant and subject to the remaining provisions hereof, Settling Defendant shall deposit Eight Million ($8,000,000.00) Dollars, in cash, in escrow, as described hereinafter, on or before the execution of this Agreement, and Settling Defendant agrees to and shall consent to the entry of a Consent Decree in the form annexed to this Agreement as Exhibit "B". Said amount and the interest thereon shall be referred to hereinafter as the "Fund." Settling Defendant further agrees that the Court may, subsequent to preliminary approval and prior to final approval of this settlement, order that an amount not to exceed $50,000.00 shall be paid out of the Fund to be used for the payment of costs and expenses incurred in connection with the giving of notice of the class action and of the proposed settlement to members of the class, including, but not limited to, the costs and expenses incurred in connection with compiling lists of class members and printing and mailing such notice. Such amount shall not be refundable to Settling Defendant in the event the settlement set forth in this Agreement is finally disapproved. Except as otherwise expressly provided herein, Settling Defendant shall not be liable for any costs or attorneys' fees, but all such costs and attorneys' fees as approved by the Court shall be paid out of the Fund and interest earned thereon. In the event federal income tax liability is finally assessed against and paid by Settling Defendant as a result of income earned in the Fund, Settling Defendant shall be entitled to reimbursment of such payment from the Fund. Settling Defendant will use its best efforts to resist any such assessment or payment.

6. The Fund shall be invested pursuant to the Escrow Agreement attached as Exhibit "A" hereto and made part hereof. Any interest earned on the Fund shall become and remain a part thereof. Settling Defendant, from time to time, may receive reports covering the status of the fund.

7. The escrow agent and plaintiffs will be reimbursed and indemnified out of the Fund for all costs and expenses incurred in the administration and distribution of the Fund. Disbursements for such costs and expenses shall be made from time to time only upon the approval of the Court. Settling Defendant shall have no responsibility with respect to the allocation, administration, or distribution of the Fund, except as expressly provided herein.

8. Except as provided in Paragraph 5 of this Agreement, no distribution of the Fund shall be made until (i) the Court has approved this Agreement and the settlement set forth herein pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice the claims of the Settlement Class members against Settling Defendant, (iii) the final affirmance on appeal of, or the final dismissal of an appeal from or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final judgment, and (iv) an order of the Court allowing such distribution. Subject to the foregoing, (a) distributions from the Fund approved by the Court may be made to pay approved costs and expenses, past and future, incurred by plaintiffs or their counsel in these M.D.L. proceedings, (b) such distributions may be made from time to time on an interim basis prior to the time when the remaining balance of the Fund may be distributed to Settlement Class members, and (c) all such interim distributions shall be paid from the Fund only if authorized or approved by and upon the

application of the Plaintiffs' Steering Committee and upon approval of the Court.

9. Upon the Court's approval of this Agreement and the settlement set forth herein, pursuant to said Rule 23(e), said final judgment shall be entered which shall provide that all claims of the Settlement Class as against Settling Defendant only arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets alleged in the Unified and Consolidated Complaint on file herein, or any amendments thereto, shall be dismissed with prejudice.

10. The settlement set forth in this Agreement shall not become effective unless and until this Agreement is approved in M.D.L. No. 310 in all respects by the Court (including the approval of the Settlement Class, as defined in paragraph 3 hereof), and, in the event that the Court refuses to approve this Agreement or any material part of it, this entire Agreement shall become null and void unless all parties promptly agree to proceed with the settlement as and if modified by the Court. In the event this Agreement becomes null and void for any reason, the Fund shall be disbursed to Settling Defendant, except that any funds actually expended or expenses incurred as respects notice to the class as provided in Paragraph 5 above, shall not be refundable to Settling Defendant, and except that any costs of administering the Fund or the settlement set forth in this Agreement, exclusive of attorneys' fees, shall first be deducted before the Fund is returned to Settling Defendant. It is expressly understood and agreed that this Settlement Agreement shall remain

in full force and effect notwithstanding any revocation or modification by any court of the Court's September 6, 1978 Class Certification Order, or paragraph 4 of the Court's December 26, 1978 Pretrial Order No. 7.

11. The fact of this settlement with the Settling Defendant shall not be construed to affect, in any manner whatsoever, any joint or several liability of any of the nonsettling defendants for the conspiracy and their acts alleged in the complaints, including, but not limited to, any acts of Settling Defendant, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding. Claimants upon the Fund prior to participation therein will execute and deliver covenants not to sue Settling Defendant, or any of its present or former officers, directors or employees, under the antitrust laws or any similar statutory or common law, asserting claims which relate to or arise out of the unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or sheets alleged in the Unified and Consolidated Complaint on file herein, as amended, on the checks or claim forms.

12. Effective upon the execution of this Agreement by the undersigned counsel, Settling Defendant agrees to cooperate fully with the designees of Plaintiffs' Steering Committee in connection with each of the following matters:

(a) Settling Defendant agrees that, notwithstanding the entry of said final order or judgment, pursuant to paragraph 9 hereof, Settling Defendant shall continue to be considered a party defendant in these class actions for the sole purpose of discovery to be conducted pursuant to the Federal Rules of Civil Procedure.

(b) Unless otherwise ordered by the Court, Settling Defendant agrees to retain, pending the final disposition of all class action cases brought on behalf of the Container Purchaser subclass and the Sheet Plant Subclass involved in the these MDL proceedings, all documents or other evidence, if any, in its possession, custody or control, or in the possession, custody or control of its attorneys or other agents relating to the subject matter of these MDL proceedings, including but not limited to, copies of transcripts of the proceedings before the United States Grand Jury for the Southern District of Texas in its investigation of the corrugated container industry, interviews by Government attorneys taken in connection with said investigation, interviews of witnesses taken by or on behalf of Settling Defendant, and summaries thereof; and subject to an agreed protective order and the provisions of Pretrial Order No. 7, filed December 26, 1978, as modified by the Court's Order filed January 12, 1979 (or as Pretrial Order No. 7 may hereafter be modified by the Court) to promptly deliver or otherwise make readily available to the designated representatives of Plaintiffs' Steering Committee, all documents and other evidence relevant to the claims asserted in the Unified and Consolidated Complaint in Settling Defendant's possession, custody or control pursuant to requests made by Plaintiffs' Steering Commitee.

(c) Nothing in this Agreement shall require Settling Defendant to provide any information or documents subject to an attorney work

product, attorney-client, or Fifth Amendment privilege (arising either individually or as part of a group defense effort), or a court order of non-disclosure, nor shall such privileges be deemed waived.

(d) Settling Defendant shall, consistent with Settling Defendant's obligations, identify with particularity the information or documents which are subject to the provisions of paragraph 12(c) and the factual basis for the asserted privilege, to the extent that such identification does not constitute a breach of the asserted privilege.

13. Entry of the Consent Decree in the form annexed to this Agreement as Exhibit "B" should not be made until (i) the Court has approved this Agreement and the settlement set forth pursuant to Rule 23(e), Federal Rules of Civil Procedure, and (ii) the entry of the Court's final judgment approving this Agreement and the settlement set forth herein and dismissing with prejudice claims of the Settlement Class members against Settling Defendant.

14. This Agreement may be executed in counterpart by the parties hereto and shall become effective upon its execution by the undersigned counsel as of the 20th day of March, 1980.

MANDELL & WRIGHT
Stephen D. Susman, Chairman
Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002

McGOVERN, OPPERMAN & PACQUIN
Vance K. Opperman, Vice Chairman
Plaintiffs' Steering Committee
1100 National City Bank Building
510 Marquette Avenue
Minneapolis, Minnesota 55402

By: Stephen D. Susman
STEPHEN D. SUSMAN

On Behalf of Plaintiffs' Steering Committee (except James Sloan and Granvil Specks) and All Designated Class Representatives of the Container Purchaser sub-class (except Ilikon Corporation).

By: H. L. Montague, Jr.
H. LADDIE MONTAGUE

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103

On Behalf of Designated Class Representatives of the Sheet Plant Sub-Class (except Great Northern Packaging Corp. and Huron Packaging Corp.)

By: E. Houston Harsha
E. HOUSTON HARSHA

KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601

On Behalf of Packaging Corporation of America.

ESCROW AGREEMENT

This Escrow Agreement, made and entered into this 25th day of March, 1980, among Packaging Corporation of America (hereinafter "Settling Defendant") a defendant in the Corrugated Container Antitrust Litigation, MDL 310, now pending in the United States District Court for the Southern District of Texas (the "Court"), the Plaintiff Class in such litigation, including both the Container Purchaser Sub-Class and the Sheet Plant Sub-Class (hereinafter the "Class") and First City National Bank of Houston (hereinafter the "Escrow Agent").

This Escrow Agreement shall become effective as between Settling Defendant and the Class and the Escrow Agent upon execution of this Agreement by Settling Defendant, by the Class and by the Escrow Agent, and the deposit by Settling Defendant of Funds in escrow as provided herein.

W I T N E S S E T H:

WHEREAS, an Agreement of Settlement, to which a copy of this Agreement is attached as an exhibit thereto and made a part thereof (hereinafter the "Settlement") has been entered into to settle the claims of the Class against Settling Defendant; and

WHEREAS, Settling Defendant has agreed that in full and complete settlement of the claims asserted by the Class in the class actions against it, subject to Court approval of the Settlement, Settling Defendant shall place into an escrow account the sum indicated in the Settlement (hereinafter called the "Fund") to earn interest and to be invested strictly according to the terms of this Agreement during the period prior to final approval and effectuation of the Settlement and distribution of the Fund to the Class; and

WHEREAS, it has been agreed that Settling Defendant shall have no responsibility with respect to the adminsitration and distribution of the Fund except as expressly provided in the Settlement;

NOW, THEREFORE, it is agreed that for good and valuable consideration, the undersigned Settling Defendant will transfer to the Escrow Agent the Fund, receipt of which the Escrow Agent acknowledges by execution of this Agreement. Such transfer by Settling Defendant shall constitute an irrevocable transfer of the Fund for the express and singular purpose of paying the liabilities of Settling Defendant under the Settlement, subject to the rights of Settling Defendant to receive the return of the Fund in the event that the Settlement as to it becomes terminated or null and void for any reason. The Fund, together with interest thereon, additions or increments thereto and reductions therefrom shall be held, invested and disbursed by the Escrow Agent strictly in the manner and subject to the conditions set forth below.

1. All funds received from Settling Defendant shall be held separately and segregated from Funds received from any other settling defendant, and separate statements of principal and interest shall be prepared for the fund of each settling defendant on a monthly basis.

2. The Escrow Agent shall invest and reinvest the Fund in Authorized Investments. Any monies held as a part of the Fund shall be invested or reinvested by the Escrow Agent in Authorized Investments. "Authorized Investments" shall be investments in (1) any bonds or other obligations of the United States of America which as to principal and interest constitute direct obligations of the United States of America, (2) obligations of the Federal National Mortgage Association, Government National Mortgage Association, Federal Intermediate Credit Banks, Federal

Banks for Cooperatives, Federal Home Loan Banks or Federal Financing Banks, (3) certificates of deposit of banks or trust companies, or notes of national bank holding companies, including the Escrow Agent, organized under the laws of the United States of America, or any state thereof, which have combined capital and surplus of at least $25,000,000.00, (4) prime commercial paper rated A-1 (Standard & Poors) or P-1 (Moody's), (5) re-purchase agreements, and (6) money market funds. In investing in Authorized Investments, the Escrow Agent shall seek to obtain the best yields consistent with safety of principal and ready marketability. The Escrow Agent, as part of the consideration for the acceptance of this Agreement, shall not be liable for any acts or omissions done in good faith, nor for any claims, demands or losses, nor for any damages made or suffered by any party to this Agreement, excepting such as may arise through or be caused by its willful or gross negligence. The Escrow Agent may make any and all such investments through its own bond department or the bond department of any bank or trust company under common control with Escrow Agent. All such investments shall at all times be made pursuant to the Settlement Agreement, and all income and profits on such investments shall be credited to, and losses thereon shall be charged against the Fund. The Escrow Agent shall have the authority to sell such investments from time to time as it shall deem appropriate.

3. Upon receipt of a certificate signed by counsel for Settling Defendant and the attorneys for the Class signatory hereto, or their successors appointed by the Court, stating that a Court order has been entered for advance to attorneys for the Class of the costs incurred in securing approval of the settlement, as defined in the Settlement, the Escrow Agent shall disburse such amount to the attorneys for the Class.

4. Upon receipt of certificates signed by counsel for Settling Defendant and by the attorneys for the Class signatory hereto, or their successors appointed by the Court, stating that: (a) the court has approved the Settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure; (b) the Court has entered final order or judgment approving the Settlement and dismissing with prejudice the actions of the Class Members against the Settling Defendant; (c) there has been a final affirmance on appeal of, or the final dismissal of an appeal from, or the expiration (without the filing or noticing of an appeal) of the time to appeal from said final order or judgment; (d) the Court has ordered distribution of the Fund to the Class and (e) that all preconditions to such distribution as contained in the Settlement have been met; the Escrow Agent will deposit or distribute the Fund as the Court, on notice to the Escrow Agent, may direct. Such deposit by the Escrow Agent shall be for the sole purpose of immediate distribution as ordered by the Court. In the event that on the date of deposit the Escrow Agent is holding investments that have not reached maturity, the Escrow Agent will hold said investments until maturity, or will sell such investments at the market as attorneys for the Class may direct, and then deposit the proceeds thereof in the manner described above.

5. Upon receipt of a certificate signed by counsel for Settling Defendant and order of the Court that its Agreement of Settlement has become terminated or null and void for any other reason, the Escrow Agent shall forthwith disburse the Fund to Settling Defendant. In the event that on the date of such disbursements the Escrow Agent is holding investments which have not reached maturity, the Escrow Agent will hold said investments until maturity, or will sell such investments at the market price as attorneys for the Settling Defendant may direct, and disburse such funds accordingly.

6. For its services, the Escrow Agent shall receive fees in accordance with the letter dated December 26, 1978, from the Escrow Agent, the original or a copy of which is attached hereto as Exhibit 1 and made a part hereof. All such fees shall constitute a direct charge against the Fund, but Escrow Agent shall not debit the Fund for any such charge until it shall have presented its statement to and received approval of counsel for Settling Defendant executing this agreement and for the Plaintiff Class signatory hereto. Such fees and all expenses charged against the Fund shall be paid out of income.

7. It is further agreed by the undersigned that:

(a) The Escrow Agent's duties and responsibilities shall be limited to those expressly set forth in this Escrow Agreement. The Escrow Agent shall not be subject to, or obliged to recognize any other agreement between the parties hereto, or directions or instructions not specifically set forth herein; provided, however, with Escrow Agent's written consent, this Escrow Agreement may be amended at any time or times by an instrument in writing signed by all the then parties in interest.

(b) The Escrow Agent is authorized, in its sole discretion, to disregard any and all notices or instructions given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions as are herein provided for. The Escrow Agent shall not make any payment or disbursement from the Fund which is not expressly authorized by this Agreement. The Escrow Agent shall notify all parties hereto, in writing and immediately of any claim of any kind whatsoever made against the Fund.

(c) In executing its duties and responsibilities hereunder, the Escrow Agent may reasonably rely only upon a written notice, demand, certificate or document set forth in

this Agreement or Court Order as valid authorization and direction to the Escrow Agent.

(d) Unless otherwise specifically indicated herein, the Escrow Agent shall proceed as soon as practicable to collect any checks or other collection items at any time deposited hereunder. All such collections shall be subject to the usual collection agreement regarding items received by its commercial banking department for deposit or collection. The Escrow Agent shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any check, note or security deposited hereunder.

8. This Escrow Agreement shall be binding upon, and inure to the benefit of, the respective parties hereto, their successors and assigns provided, however, that no party may assign its interest under this Escrow Agreement without the prior written consent of the other parties to this Escrow Agreement, and such consent shall not be unreasonably withheld.

(a) The Escrow Agent may resign from this Escrow Agreement, and thereby become discharged from the obligations hereby created, by notice in writing given to Settling Defendant and the attorneys for the Class signatory hereto, or their successors appointed by the Court, not less than sixty (60) days before such resignation is to take effect, but such resignation shall take effect immediately upon the substitution of a new Escrow Agent hereunder, if such new Escrow Agent shall be substituted before the time limited by such notice and shall then accept the obligations thereof.

(b) If at any time hereafter the Escrow Agent shall resign, be removed, be dissolved or otherwise become incapable of acting, or the bank or trust company

acting as Escrow Agent shall be taken over by any governmental official, agency, department or board, or the position of the Escrow Agent shall become vacant for any of the foregoing reasons or for any other reason, Settling Defendant shall appoint an Escrow Agent to fill such vacancy.

(c) Every successor Escrow Agent appointed hereunder shall execute, acknowledge and deliver to its predecessor, and also to Settling Defendant and the agents and attorneys of the Class signatory hereto, or their successors appointed by the Court, an instrument in writing accepting such appointment hereunder, and thereupon such successor Escrow Agent, without any further act, shall become fully vested with all the rights, immunities, and powers, and subject to all of the duties and obligations, of its predecessor; but such predecessor shall, nevertheless, on the written request of its successor, and upon payment of the expenses, charges and other disbursements of such predecessor which are payable pursuant hereto, execute and deliver an instrument transferring to such successor Escrow Agent all the rights, immunities and powers of such predecessor hereunder; and every predecessor Escrow Agent shall deliver all property and monies held by it hereunder to its successor. Should any instrument in writing from Settling Defendant be required by any successor for more fully and certainly vesting in such Escrow Agent the rights, immunities and powers hereby vested or intended to be vested in the precedessor Escrow Agent, any such instrument in writing shall and will, on request, be executed, acknowledged and delivered by Settling Defendant.

9. Each recipient of any portion of the Fund, whether a Settling Claimant or Settling Defendant, shall bear the liability, if any, for any taxes on the income earned on such portion of the Fund received by the recipient.

10. No Class Member shall have any right, title or interest in or to any portion of the principal or interest of the Fund until such time as Class Member, pursuant to order of the Court authorizing distribution, shall receive payment of its approved pro rata share of the settlement fund.

11. The Settling Defendant shall not have any right, title or interest to any portion of the principal or interest of the Fund until such time as Settling Defendant, pursuant to the settlement and this Agreement, shall receive return of its contribution to the Fund upon termination of the Settlement.

12. No representations or warranties have been made by or shall be implied against or as to any party with respect to the facts or transactions upon which this Escrow Agreement is based. The Escrow Agent is and shall be independent and neither Settling Defendant nor the Class retain any authority whatever relative to the investment of the Fund, provided only that as parties hereto, Settling Defendant and Class shall be entitled to institute actions to compel or require performance by the Escrow Agent of its obligations hereunder.

13. It is understood and acknowledged by the parties hereto that the Court may, at any time, appoint an investment adviser to direct the investment and reinvestment of the Fund and suggest that the parties enter into a custody agreement so that the Escrow Agent will become a custodian of the Fund, investing same at the direction of the investment adviser so appointed and charging only standard custodial fees for its services. The parties hereto agree to enter a custody agreement to replace this Escrow Agreement in the event the Court does appoint an investment adviser for the Fund.

14. All certificates, notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed to have been duly given if addressed and delivered or deposited in the U.S. mails by registered or certified mail, return receipt requested, postage prepaid, to the undersigned Settling Defendant through its counsel signatory hereto; to Class Members through attorneys for the Class signatory hereto, and to the Escrow Agent as follows:

First City National Bank of Houston
909 Fannin Street
Post Office Box 809
Houston, Texas 77002

Attention: Mr. Jack Little

15. This Escrow Agreement shall be governed by and construed in accordance with, the laws of the State of Texas.

16. This Escrow Agreement may be executed in a number of different counterparts, all of which together shall be deemed to constitute one agreement, and any party may execute this Escrow Agreement and become a party hereto by signing any such counterpart.

17. The Escrow Agent shall not be bound by nor deemed a party to the Settlement and its sole responsibility shall be to act only as expressly set forth in the Escrow Agreement.

18. The signatories hereto represent and warrant that they are fully authorized to enter into the terms and conditions of, and to execute this Agreement on behalf of the respective parties hereto.

IN WITNESS HEREOF, the Escrow Agent, the Plaintiff Class, and the undersigned Settling Defendant have caused

this Escrow Agreement to be signed as of the date and year first above written.

FIRST CITY NATIONAL BANK OF HOUSTON

By: _____
Vice President

ATTEST:

_____
Trust Officer

THE PLAINTIFF CLASS

By: _____
Stephen D. Susman

PACKAGING CORPORATION OF AMERICA

By: _____
E. Houston Harsha

DATED:

March 25, 1985

FIRST CITY NATIONAL BANK
OF HOUSTON

JACK M. LITTLE, III
Vice President & Trust Officer

December 26, 1978

Mr. Sidney Ravkind
Mr. Stephen D. Susman
Mandell & Wright
1901 First National Life Building
Houston, Texas 77002

Re: Corrugated Container Antitrust Litigation

Dear Messrs. Ravkind and Susman:

This is to advise you of First City National Bank's fees for serving as escrow agent in connection with the settlement of this litigation. The following schedule will apply to each separate Escrow Account:

A basic annual fee of $450 which will be prorated in the event of withdrawal or termination.

A transaction charge of $20 for each purchase or sale of a security or other investment.

An annual investment management fee of 1/20 of 1% of the market value of the assets in the account. This fee will be pro-rated to the date of termination when an account terminates.

A fee of $2.00 per remittance, including payments of costs and distributions of funds to Plaintiffs.

In no event shall the total of the above-stated fees annually exceed 1/10 of 1% of the market value of the assets.

Yours truly,

Jack M. Little III
Vice President & Trust Officer

2 HOUSTON CENTER, SUITE 750, 909 FANNIN, P.O. BOX 809
HOUSTON, TEXAS 77001, TELEPHONE (713) 658-6821
MEMBER FIRST CITY BANCORPORATION OF TEXAS, INC.

Exhibit 1

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	
	§	M.D.L. NO. 310
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS EXCEPT:	§	
FRANKLIN CONTAINER CORP., ET AL. (C.A. NO. H-78-671)	§	

CONSENT DECREE

WHEREAS, plaintiff Atlas Container filed its complaint herein on February 1, 1978, plaintiffs Great Northern Packaging Corp. and Huron Packaging Corp. filed their complaint on October 25, 1978, and plaintiff Rollins Container, Inc. filed its complaint herein on February 20, 1979, and

WHEREAS, each of the aforesaid plaintiffs (the "Settling Plaintiffs") filed on its own behalf and on behalf of a class as defined in the respective complaints; and

WHEREAS, the Court certified, on September 6, 1978, a class consisting of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendants, at any time during the period from January 1, 1960 to January 25, 1978, and the Court on December 26, 1978, certified two subclasses thereof including a Sheet Plant Subclass consisting of all Sheet Plants (as defined in the Court's Order of December 26, 1978) which purchased corrugated sheets in the United States during the period January 1, 1960, to January 25, 1978; and

Exhibit "B"

WHEREAS, Rollins Container, Inc. was named as third representative of the Sheet Plant Subclass pursuant to Pretrial Order No. 16 dated June 8, 1979; and

WHEREAS, the above-named plaintiffs (or a majority of them), as representatives of the Sheet Plant Subclass, and the undersigned defendant (hereinafter referred to as "Settling Defendant"), a defendant in one or more of these three actions, by its respective attorneys, have agreed to entry of this Consent Decree without admission of any liability and without trial or adjudiciation of any issue of fact or law in the above proceedings, and without this Consent Decree constituting evidence or any admission by any party signatory hereto with respect to any such issue, and

WHEREAS, the Consent Decree and the injunction ordered and granted herein, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, constitutes an integral part of the Settlement Agreement, dated _____, of the above actions entered into by Settling Defendant and the Settling Plaintiffs, acting as representatives of the Sheet Plant Subclass;

NOW, THEREFORE, following appropriate research, investigation, inquiry and negotiations, but without trial or adjudiccation of any issue of fact or law in the above proceeding, and upon the consent of the signatory parties and with the approval of this Court pursuant to Rule 23 of the Federal Rules of Civil Procedure, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties to this Consent Decree.

II.

DEFINITIONS

A. "Corrugated sheets" consist of linerboard (a flat paper product manufactured in mills and sold in rolls) and medium (a paper product manufactured in mills and sold in rolls), glued together in layers in which the fluted medium is between the two or more layers of linerboard.

B. "Corrugated containers" are containers made of corrugated sheets.

C. A "sheet plant" is defined as a person (excluding present defendants in MDL 310 and all subsidiaries and affiliates of such defendants) who (a) purchased corrugated sheets, (b) manufactured and sold corrugated containers and/or corrugated fillers, pads and partitions which were sold for use in or with corrugated containers, and (c) did not manufacture corrugated sheets.

III.

APPLICABILITY AND NOTICE

Within thirty (30) days after the effective date of this Consent Decree, Settling Defendant is ordered and directed to deliver a copy of the Consent Decree to each of its officers and regional managers, plant managers and sales managers, whose product responsibility includes corrugated sheets or corrugated containers, and thereupon file an affidavit with the Clerk of the Court, with a copy thereof to the attorneys for the class, that it has done so, which affidavit shall set forth the name of each person so served.

The effective date of this consent decree is defined in Section VIII, infra.

IV.

PRICE FIXING-PREDATORY PRICING

Settling Defendant is enjoined and restrained from directly or indirectly entering into, adhering to, enforcing, furthering, or maintaining any unlawful combination, conspiracy, agreement, or understanding with any other manufacturer

or seller of corrugated containers or corrugated sheets to:

(a) Fix, depress, raise, stabilize or otherwise maintain prices, or to exchange prices, or price formulae, or other terms of conditions of and for the sale of corrugated sheets to any member of members of the Sheet Plant Subclass;

(b) Divide, allocate, or otherwise apportion customers which are members of the Sheet Plant Subclass or markets composed of such customers with respect to corrugated sheets;

(c) Refrain from soliciting the business of or refrain from dealing with, any customer or potential customer for corrugated sheets which is a member of the Sheet Plant Subclass;

(3) Engage in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets, including, but not limited to, a price squeeze affecting members of the Sheet Plant Subclass.

V.

MONOPOLIZATION - PREDATORY PRICING

Settling Defendant is enjoined and restrained from monopolizing, conspiring to monopolize, or attempting to monopolize any relevant geographic market for corrugated containers or corrugated sheets in violation of the federal antitrust laws by engaging in a practice of predatory pricing with respect to corrugated sheets in relation to corrugated containers or corrugated containers in relation to corrugated sheets.

VI.

RECORD RETENTION

A. For the purpose of assuring and securing compliance with this Consent Decree, Settling Defendant shall retain during the period of this Consent Decree such books and records, including, but not limited to, correspon-

dence and memoranda, maintained in the usual and ordinary conduct of its corrugated sheet and corrugated container business as may be necessary to determine costs, prices, profits, transactional data, and expense accounts for the persons described in Section III, supra.

B. In the event that any Settling Plaintiff or any member of the Sheet Plant Subclass has reasonable cause to believe that the terms and conditions of this Decree may not have been complied with by any plant or plants of Settling Defendant, then such Settling Plaintiff or member of the Sheet Plant Subclass may petition this Court, on a showing of such reasonable cause, for an Order directing such Settling Defendant to show cause why Settling Defendant should not be required to produce all books and records of such plant or plants of such Settling Defendant relevant to such alleged non-compliance with the terms and conditions of this Decree, subject to the entry of an appropriate protective order.

C. No information obtained by the means provided in Subparagraph B of this Section shall be divulged to any person or used for any purpose other than in the course of legal proceedings for thepurpose of securing compliance with this Consent Decree, or as otherwise required by law.

VII.

RETENTION OF JURISDICTION

Until the termination of this Consent Decree, jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Decree to apply to this Court at any time for such further order and directions as may be necessary or appropriate for the construction, implementation, or carrying out of this Consent Decree, for the enforcement of compliance therewith, and for the punishment of any violation.

VIII.

EFFECTIVE DATE OF DECREE

This Consent Decree shall become effective upon approval by the District Court in the above-captioned actions in accordance with and as provided in the Settlement Agreement executed and delivered by the parties concurrently herewith. Any appeal thereof will not delay the effective date of this Consent Decree. This Consent Decree shall, subject to the terms of the Settlement Agreement, remain in effect until January 31, 1984, at which time it shall terminate.

IX.

CONSTRUCTION, INTERPRETATION AND ENFORCEMENT OF THIS DECREE

A. This Consent Decree shall be construed, interpreted and enforced so as to carry out its principal purpose of protecting competition.

B. Nothing contained in this Consent Decree shall be construed to prohibit conduct lawful under the antitrust laws, including the Sherman Act, the Clayton Act and the Robinson-Patman Act, nor shall anything in this Consent Decree be construed to authorize conduct prohibited by such antitrust laws.

X.

AMENDMENTS

This Decree may be amended in writing but only upon consent of the attorneys for the Sheet Plant Subclass (or a majority of them) and counsel for the settling defendant with the approval of the Court, with notice to all Subclass representatives, but without further notice to members of the Sheet Plant Subclass, unless otherwise directed by this Court.

DATED:

Representatives of the
Sheet Plant Subclass

ROLLINS CONTAINER, INC.

By_____
Its Attorney

PACKAGING CORPORATION OF AMERICA

By_____

ATLAS CONTAINER

By_____
Its Attorney

ORDERED, ADJUDGED AND DECREED ON _____,

1980.

_____
Judge of the District Court

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of March, 1980, a true and correct copy of Agreement of Settlement Between Container Purchaser and Sheet Plant Subclasses and Defendants Packaging Corporation of America was served on attorneys for all plaintiffs and attorneys for all defendants, by mailing same to them at their business office addresses with first-class postage affixed.

Stephen D. Susman

STEPHEN D. SUSMAN

U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 21 1979
V. BAILEY THOMAS, CLERK
DEPUTY:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	§	
THIS DOCUMENT RELATES TO ALL ACTIONS EXCEPT:	§	M.D.L. No. 310
FRANKLIN CONTAINER CORP., ET AL. (C.A. H-78-671)	§	

PRETRIAL ORDER # 31

A pretrial conference and settlement hearing was held before the court on December 3 and 4, 1979, to decide whether certain proposed settlements herein should be finally approved, and other matters. The court having studied the various motions, objections, briefs, memoranda, and argument on these issues, makes the following order:

1. International Paper's objection to the production of documents relating to linerboard on the ground of relevancy are OVERRULED.

2. The application of the Sheet Plant Subclass for allocation of $11,000,000.00 from the settlements of Container Corporation of America, the Continental Group, Green Bay Packaging, Inland Container, McMillan Bloedel and its participating subsidiaries, Olinkraft, Owens-Illinois, St. Joe Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, and Weyerhaeuser Company with the container purchaser subclass, unopposed by the container purchaser subclass, is adequate, fair and reasonable and it is hereby GRANTED.

3. In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, it is hereby ORDERED that

a. Defendant the Mead Corporation's complaint attempting to assert a right of contribution in these cases is hereby dismissed with prejudice;

b. All other contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice.

4. For the reasons set forth in the attached Memorandum Opinion, which is incorporated herein by reference, the motion of class representatives for final approval of settlements with the following defendants is GRANTED: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U.S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. All objections to these settlements are OVERRULED.

5. For the reasons set forth in the attached Memorandum Opinion, the motions of South Carolina objectors to permit filing of claims without release of state claims, and to remove state claims from the class allegations are DENIED.

6. The plaintiff class representative's proposed plan of distribution to class members is APPROVED, for reasons set forth in the attached Memorandum Opinion.

7. The application of the State of Kansas for an extension of time to opt out of the class is DENIED.

8. Plaintiffs' motion to direct defendants to furnish purchase records as requested by absent class members or Arthur Anderson & Co. is DENIED.

9. Plaintiffs request that paragraph 6 of Pretrial Order No. 11 be amended to provide that plaintiffs shall have access to documents in defendants' possession relating to the period 1960-1969 on the same basis as documents relating to 1970 and thereafter

is GRANTED and paragraph 6 of Pretrial Order No. 11 is hereby rescinded.

10. Any party wishing to challenge the representation by Mr. Fred A. Freund (of the firm Kaye, Scholer, Fierman, Hays and Handler) of members of the plaintiffs' class or subclasses, or the participation of Mr. Freund on the Claims Subcommittee of Plaintiffs' Steering Committee, shall file its motion to disqualify by December 31, 1979.

11. The next pretrial conference in these cases shall be January 8, 1980, at 9:30 A.M.

DONE and ENTERED this 21st day of December, 1979, in Houston, Texas.

UNITED STATES DISTRICT COURT

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAY 29 1980
JESSE E. CLARK, CLERK
BY DEPUTY: R. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER	§	
	§	M.D.L. 310
ANTITRUST LITIGATION	§	(ALL CLASS CASES)

PRETRIAL ORDER 52

The court having held conferences in this litigation on May 22, 23, 26, and 27, and having studied the numerous motions pending, enters the following order:

1. The trial date is postponed until Monday, June 2, 1980.

2. The motions of Bookout & Mitchell and the American Lutheran Church to withdraw their requests for exclusion from the class are GRANTED. They shall be considered class members with all the rights and obligations accruing to that status.

3. The motions of Crown-Zellerbach, Packaging Corporation of America, Georgia-Pacific, Fibreboard Corporation, Potlatch Corporation, and the Fibre Box Association for severance are GRANTED. Any trial of these six causes shall be stayed pending final resolution of their settlements with the class.

4. Defendants' motion for reconsideration on the admission of evidence of fifth amendment invocations is DENIED.

5. Plaintiffs' motion in limine to preclude mention before the jury of treble damages is GRANTED.

6. Plaintiffs' motion in limine to preclude mention of acquittals in the criminal case and defendants' motions to preclude mention of the grand jury investigation, indictments, nolo pleas, and settlements are all GRANTED except for the court's instructions to the jury.

7. Defendants' motion in limine to preclude reference to counsel as being from cities other than Houston is GRANTED.

8. Plaintiffs' motion for an order declaring portions of grand jury and interview statements admissible under Rule 804(b)(3), F.R.E., is DENIED.

9. Plaintiffs' motion for an order declaring portions of grand jury and interview statements admissible under Rule 801(d)(2)(D), F.R.E., is GRANTED as to statements made during the existence of an employment relationship with Mead, Alton, or Westvaco. Such statements would be admissible under this section only against the employer.

DONE this 28th day of May, 1980 in Houston, Texas.

UNITED STATES DISTRICT JUDGE

FILED
OCT 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, AND GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Of Counsel:
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MANDELL & WRIGHT,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, AND GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondents-Plaintiffs, representatives of a class of persons purchasing corrugated containers from defendants, including Petitioners, respectfully pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

QUESTION PRESENTED.

Whether in a price-fixing conspiracy action brought as a class action under the antitrust laws, this Court should create a new rule of contribution permitting non-settling defendants, who may or may not be ultimately found guilty of price-fixing, to now assert a claim for contribution against defendants who settled in good faith with the class under circumstances that the

District Court, in approving the settlements according to Fed. R. Civ. P. 23(e), expressly found to be non-collusive, fair and reasonable.

REASONS FOR DENYING THE WRIT.

This Court should deny the Writ because there is no real conflict in decisions concerning contribution in price-fixing cases, because the decisions of the courts below denying contribution were correct, because creating a new judicial rule of contribution is inappropriate especially in light of current consideration of the matter by Congress and because contribution would be unfair and improper in this particular case, which involves charges of a massive nationwide price-fixing scheme in one of our country's basic industries.

A. There Is No Real Conflict Among the Lower Courts.

Contrary to Petitioners' argument, there is no real conflict among the lower courts. Courts have repeatedly rejected contribution in the context of price-fixing allegations. *See Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cases (CCH) ¶ 62,717 (E. D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, MDL 50, 917 ANTITRUST & TRADE REG. REP. (BNA) 1 (D. D. C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.*, v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969). *Cf. Goldlawr, Inc.* v. *Schubert*, 276 F. 2d 614 (3d Cir. 1960).

The only case cited by Petitioners in support of contribution, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), a case involving a refusal to deal rather than price-fixing, is distinguishable from the

case now before this Court on several grounds.[1] Professional Beauty Supply ("Professional") sued a competitor, National Beauty Supply ("National") after Professional's distributorship had been cancelled by LaMaur, its supplier. National sought to assert a claim for contribution against LaMaur, which had not been sued by Professional. The Court of Appeals held that because the factual circumstances of that case *might* justify contribution, it had been improper to dismiss the third-party complaint for contribution. 594 F. 2d at 1186.

The decision in *Professional Beauty Supply* was specifically limited to certain facts which strongly suggested collusion, and thus unfairness, in the absence of some allocation of damages. Specifically, there was evidence that the supplier was not named as a defendant in exchange for an agreement to renew Professional Beauty Supply's franchise. 594 F. 2d at 1185. Thus the court held *not* that contribution was available in all antitrust actions, as Petitioners suggest, but that contribution should be available where necessary to protect against collusion and bad faith:

> The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors *at least under certain circumstances.* There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone *because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.*

---

1. The simple fact that *Professional Beauty Supply* involved a refusal to deal rather than price-fixing may itself be a significant factor in evaluating any "conflict" among the lower courts. This Court has consistently held that a refusal to deal is unlawful only if unreasonable, whereas price-fixing is illegal per se because it attacks the very foundation of our economic system. *See, e.g., Continental T. V. Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 49-50 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609-10 (1972). This distinction in standards of legality reflects the relative evils involved and may warrant greater consideration of contribution, based on fairness, where reasonableness is the standard, but greater deterrence and no contribution, where defendants have engaged in the more odious price fixing.

> . . . *We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution.* The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case, including the factors specified by Justice White in his concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra.* (Emphasis added).

594 F. 2d at 1185-1186. Furthermore, the Court in *Professional Beauty Supply,* noting that "[t]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case", 594 F. 2d at 1184, indicated that the proper means of protecting defendants settling in good faith might be to permit a reduction in damages only by the amount previously recovered. *See* 594 F. 2d at 1184 citing *"Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321 (1971) (if plaintiff recovered damages in settlement from one defendant he could not recover for the same damages from another defendant)."[2] Thus, at least in the context of this case, where fairness argues strongly against permitting contribution, see pp. 10-13 *infra,* the opinion of the Court of Appeals for the Eighth Circuit is not in conflict with those of other courts and does not provide sufficient reason to grant the Writ.

B. The Decisions of the Courts Below Denying Contribution Were Correct and Consistent with Well Established Precepts of This Court.

The no-contribution rule upheld by the courts below necessarily follows from several lines of precedent established by this Court. First, this Court has continually held that a primary purpose of the antitrust laws is deterrence. *Pfizer, Inc.* v.

2. It is thus clear that the Court in *Professional Beauty Supply* did not necessarily endorse claim reduction, as Petitioners suggest. In any event, claim reduction is not before this Court at this time. See n. 7 *infra.*

Government of India, 434 U. S. 308 (1978); *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). Second, the aims and purposes of the treble damage remedy under the antitrust laws require that a defendant not be released by virtue of a settlement concluded with another defendant except to the extent of money actually received by the plaintiff from the settling defendant to prevent double recovery. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321, 346, 348, *reh. denied,* 401 U. S. 1015 (1971); *see Baugham* v. *Cooper-Jarrett, Inc.,* 530 F. 2d 529, 533-35 (3d Cir. 1976); *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368 (9th Cir. 1957). Finally, this Court has stressed that the paramount importance of the private civil damage action as the "bulwark of antitrust enforcement," *Perma Life Mufflers, Inc.* v. *International Parts Co.,* 392 U. S. 134, 139 (1968), requires that complexities which would discourage private treble damage actions be eliminated wherever possible. *See Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 747 (1977) (no standing for indirect purchasers); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 489 (1968) (no defense allowed for "pass-through" of costs); *Perma-Life Mufflers, Inc.* v. *International Parts Co.,* 392 U. S. 134, 140 (1968) (no defense allowed for "in pari delicto").

Each of these established rules clearly supports the decisions of the courts below and warrants denial of the Writ sought by Petitioners. Deterrence, which is stressed under the antitrust laws by the provision for treble damages, would be severely undermined if a potential conspirator were permitted to seek contribution and thus to consider the risk of liability for price-fixing as a mere business risk. Furthermore, permitting contribution would make antitrust litigation tremendously more complex and less amenable to control by the private plaintiffs on whose shoulders effective enforcement rests; in this case alone, contribution among the 38 defendants could aggregate over 1300 claims. Finally, because mutual resolution of the substantially increased number of claims is virtually impossible and because many defendants would be reluctant to settle with plain-

tiffs while remaining subject to potential liability to the non-settling defendants, the inevitable result of contribution would also be a reversal of the long established principle of this Court that settlement should be encouraged.[3] *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 346-47, *reh. denied*, 401 U. S. 1015 (1971); *Williams* v. *First National Bank*, 216 U. S. 582, 595 (1910). Thus, the decisions below rejecting contribution are consistent with long established principles enunciated by this Court and necessary for effective continued functioning of private antitrust litigation.

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3. The petitioners admit that contribution would discourage settlement, but argue that such an effect can be avoided by the settling parties agreeing upon or the Court imposing "claim reduction." With claim reduction, plaintiffs' claim against the remaining defendants would be reduced not only by the amount the plaintiffs have received in settlement from the other defendants, but also by the amount of the overcharge attributable to the settling defendant's sales, or by the defendant's market share. The instant case presents two dramatic examples of the way in which settlement would be discouraged by a rule of contribution, even if it were coupled with some sort of claim reduction. The instant case is a class action and no class action may be settled unless the trial court finds that the amount of the settlement is fair and reasonable to the class. Free of contribution or claim reduction, partial settlements with less culpable and less solvent defendants are possible because only the amount paid in settlement is subtracted from the plaintiffs' damages, and the plaintiffs do not waive a greater portion of their damages claim. *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir. 1957); *Wainwright* v. *Kraftco*, 58 F. R. D. 9, 12 (N. D. Ga. 1973): If contribution or claim reduction were the rule, plaintiffs would not be able to settle inexpensively with less solvent defendants or defendants against whom proof is more sparse, because by so settling plaintiffs would be foregoing a much larger portion of their damage claim. The court would be unlikely to approve any such settlement as fair and reasonable to the class. Consequently, the least meritorious claims and claims against the least solvent defendants would be unable to settle. At least two of the settlements entered in this litigation were explicitly "hardship" settlements with defendants who, regardless of culpability or damages, could not afford to pay more. See Petitioners' Brief at 13. Plaintiffs would not have been willing to accept these settlements, which preserved the continued competitive viability of these financially troubled defendants, if the result would have been an automatic and substantial reduction in plaintiffs' claims based on sales or damages attributable to these defendants, nor could the court have approved them.

C. Creation of a New Rule Permitting Contribution Should Be Left to Congress, Especially in Light of Pending Consideration in Congress of the Issue of Contribution in Antitrust Cases.

This Petition is particularly untimely in view of the fact that legislation on contribution in price-fixing cases is currently pending in Congress. See S. 1468, 96th Cong. 1st Sess. (1979).[4] This Court has long acknowledged that Congress, rather than the courts, is responsible and best equipped for making appropriate evaluations in connection with policy decisions. In no area is this judicial restraint more desirable than in antitrust litigation, where treble damages and joint and several liability are crucial elements of the Congressional scheme of private enforcement. This Court recently recognized that such deference to Congress is particularly appropriate in connection with claims, such as those asserted by Petitioners here, that large damage awards in antitrust class actions will have a disastrous effect upon defendants, and that therefore the courts should fashion rules to undermine these important elements of the Congressional scheme:

> [R]espondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in § 4 [of the Clayton Act].

Reiter v. *Sonotone Corp.*, 47 U. S. L. W. 4672, 4676 (June 11, 1979). As in *Reiter*, the Petitioners in the instant case have

4. A copy of this bill as favorably reported by the Senate Committee on the Judiciary in November, 1979 is contained at A4 of Appendix A. This bill would only apply to litigation commenced after its passage, thus indicating a specific choice not to apply contribution to existing cases such as this.

argued unfairness primarily because of the size of the case and the potential liability involved[5] and have made arguments that have little to do with the antitrust statutes enacted by Congress. Yet surely this Court should be reluctant to use this case, where claims are indeed sizeable, as a vehicle for fashioning a rule of law that would apply to even the most garden variety antitrust case.

This Court has already held that contribution is one of those policy issues best left to Congress. In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), this Court strongly cautioned against taking from the Congressional domain the creation of rules relating to contribution:

> In the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors [citing Union Stock Yards Co. v. Chicago B. & Q. R. Co., 196 U. S. 217, 224 (1904)] . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.

342 U. S. at 285 (1952).[6] Nowhere is this policy more appropriate than in interpreting the long standing antitrust statutes.

---

5. Indeed, it is the magnitude of the damages for which the defendants would be liable and not contribution which, according to Petitioners, causes the problem. George Kress, chairman of settling defendant Green Bay and author of the prepared statement to the Senate Judiciary Committee which is Petitioners' Appendix G, conceded to the Senate Judiciary Committee that contribution would not solve his problem because the high damage exposure upon being found guilty of price-fixing would still be a powerful inducement to settle. See Hearings before the Subcommittee on Antitrust, Monopoly and Busines Rights of the Committee on the Judiciary, United States Senate on S. 1468, June 8 and 12, 1979 at p. 43.

6. This rule of judicial restraint is in no way undermined by the decision in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), inappropriately cited by Petitioners. In *Cooper Stevedoring Co.*, this Court upheld "the well-established maritime rule allowing contribution", which was contrary to the general common

(Footnote continued on next page.)

Indeed, it appears that Congressional intent upon adoption of the Clayton Act in 1914 was not consistent with contribution. The Report of the Committee on the Judiciary of the United States Senate on S. 1468 notes that the proposed bill would "supply the appropriate congressional intent" which courts have perceived was lacking. Appendix A at A10. In explaining why the need for contribution is different today than in 1914, the Report notes:

> the problem in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970s, after a revision of Rule 23 to permit the modern class action in 1966 and the denial of the pass-on defense in [*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968)].

Rep. No. 96-428 (S. 1468) (Appendix A) at A11.

The persistent reliance by Petitioners upon cases involving claims under the federal securities laws is entirely misplaced and misleading. Whereas the antitrust statutes contain no reference to contribution, the securities laws specifically provide for contribution where Congress has established private rights of action. *See* 15 U. S. C. §§ 77k, 78i, 78r. Other comparisons also support the conclusion that lack of contribution in the antitrust statutes evidences a desire for greater deterrence than in the securities laws. *Compare* 15 U. S. C. § 15 (treble damages in antitrust actions) *with* 15 U. S. C. § 78bb(a) (damages for actual losses only in securities actions); *compare United States* v. *Container Corp.*, 393 U. S. 333 (1969) (intent to agree to fix prices required) with *First Virginia Bankshares* v. *Ben-*

(Footnote continued from preceding page.)

law, 417 U. S. at 113, while reaffirming *Halcyon Lines*. *Id.* at 112-113. Indeed, this Court's recent decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 47 U. S. L. W. 4868 (June 27, 1979), reaffirmed not only *Halcyon Lines* and *Cooper Stevedoring Co.* but also the broader policy against judicial intervention in legislated areas, citing both earlier decisions. 47 U. S. L. W. at 4872.

son, 559 F. 2d 1307 (5th Cir. 1977), *cert. denied*, 435 U. S. 952 (1978) (reckless conduct sufficient for securities law violation) and 15 U. S. C. § 77*l* (misrepresentation without scienter actionable under securities laws). The conspicuous absence of any provisions relating to contribution in the antitrust statutes is indeed significant, for this Court has continually noted that:

> "Obviously, then, when Congress wished to provide a private damage remedy, it knew how *to do* so and did so expressly. *Touche Ross & Co.* v. *Redington*, 47 U. S. L. W. at 4735; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. at 734; see *Amtrak*, 414 U. S., at 458; *T. I. M. E., Inc.* v. *United States, supra*, at 471.

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 48 U. S. L. W. 4001, 4004 (November 13, 1979).

Although it is clearly within the province of Congress to amend the antitrust statutes to deal with the modern development of the large class action, such a development is not a sound basis for a new interpretation by this Court of the statutes that preceded that development. Where, as here, the creation of a new policy sought by Petitioners is being fully considered in Congress at this time, and the Congressional decision will determine the course which courts will follow, the Writ should be denied.

D. If Fairness Is Truly a Consideration in Contribution, as Petitioners Contend, This Case Is Peculiarly Inappropriate for Granting the Writ.

Petitioners have suggested that alleged "settlement coercion" and "inequitable allocation of liability" make contribution warranted in this case. As Respondents have noted above, Petitioners apparently would have this Court make decisions on the basis of the size of potential damages rather than the legal issues, a decision generally left to Congress. However, Petitioners' position is even more untenable, because under the

circumstances of this case, fairness would necessarily preclude contribution.[7]

First, Petitioners (who have *not* settled) argue the financial hardships faced by several small settling defendants who are asserted to be marginally profitable and otherwise in financial trouble (Petitioners' Brief at 12-13). Yet, it is these very same settling defendants who would be most injured by a rule permitting contribution. If contribution were permitted, these settling defendants, who, according to Petitioners, have been "coerced or driven to the edge of bankruptcy, would be forced to pay just that much more![8] Thus it is contribution which in this context could be used by larger non-settling defendants as a coercive anticompetitive device to drive their smaller competitors out of the marketplace.

Second, this case is a particularly inappropriate vehicle for considering the contribution issue because of the wide range

7. Even if unfairness did exist, Petitioners can raise these arguments more appropriately at or after trial. Petitioners impermissably attempt to raise before this Court the concept of "claim reduction" or "carve out" by which the settlements would be preserved and plaintiffs would automatically lose that portion of their claims against the non-settling defendants equal to the market shares of the settling defendants. The numerous theoretical and practical falacies inherent in such a concept need not be discussed at this time. However, it must be noted that the District Court's denial of the affirmative defense of "claim reduction" was determined by the Court of Appeals to be nonappealable, and the appeal by Petitioners as to this issue was dismissed (See Petitioners' Brief, Appendix B). The Court of Appeals has never ruled on the merits of this issue and no ruling on claim reduction has been presented to this Court. Furthermore, in the recent decision of the District Court approving the class action settlements with certain defendants, Judge Singleton reserved consideration of the motion for claim reduction until "the case is submitted to a jury." Appendix B hereto at B12. The issue of claim reduction thus will not be ripe for appeal until a later date and cannot be considered at this time.

8. The District Court in this case, in recently approving the settlements, noted that these defendants would be bound to the settlement agreements even if this Court reversed the decision of the Fifth Circuit Court of Appeals on the contribution issue, stating that the contingencies regarding contribution were factored into the settlement agreements by defendants' attorneys. Appendix B at B12.

of factors considered by the District Court in approving the settlements. Because the cases in MDL 310 were filed as class actions under Rule 23 of the Federal Rules of Civil Procedure, the District Court was required to and did scrutinize and pass upon each proposed settlement to ensure that each was negotiated in good faith, was not the product of plaintiffs' "whim or spite or of collision" with the settling defendants, and was satisfactory on the basis of all relevant factors, including among them the financial ability of the defendants. See Fed. R. Civ. P. 23(e). Thus, this case is the farthest extreme from the collusive situation present in *Professional Beauty Supply, supra,* and review of the issue of contribution in this case at this time would likely be fruitless in light of the determinations as to the good faith of plaintiffs and defendants in the settlements already approved by the District Court in its discretion. *See Protective Committee* v. *Andersen,* 390 U. S. 414 (1968).

Third, Petitioners' charges of "coercion" and "settlement stampedes" have a hollow ring. No innocent defendant was coerced into settling for the substantial sums paid below.[9] The District Court, clearly in the best position to do so, gave careful consideration to these charges before denying contribution and before granting final approval to the settlements. Any defendant which considers itself wrongly accused of price-fixing

9. In support of their allegation that innocent parties were pressured into settling, Petitioners have submitted a blatantly untrue statement made by George Kress of Green Bay Packaging, Inc., before the Senate Judiciary Committee (Petitioners' Appendix G). At page G-2. Kress states, "Green Bay was not indicted, and none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial." In truth *eleven Green Bay employees were identified as co-conspirators by the Justice Department,* as the letter dated July 21, 1978, from J. Albert Kroemer, Antitrust Division of the Department of Justice, Dallas Office, clearly states. Appendix C. This letter, naming eleven Green Bay employees as co-conspirators, was filed in the criminal case as an informal bill of particulars, and Petitioners should not be heard falsely to claim that Green Bay employees were not named as co-conspirators. There is thus no substance to Petitioners' claim that any innocent party was forced to settle.

always has the option of establishing its innocence at trial. The possibility of any form of contribution would, after all, come into play only after a defendant has been found guilty of price-fixing.

Finally, this case is an inappropriate vehicle to review the issue of contribution because it is likely that any decision to adopt a rule of contribution would not apply to this particular case. The settling defendants have argued that their reliance upon long established precedent and the hardship that would be caused to them by now adopting a rule of contribution requires that any new rule permitting contribution be given prospective effect only under the doctrine enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). The points made in Petitioners' own brief concerning the tremendous burden upon these settling defendants seems to support this contention. Under such circumstances, granting the Writ would be improvident and review should await the full termination of the litigation in the District Court.

CONCLUSION.

For each of the foregoing reasons, Respondents-Plaintiffs respectfully request that the Writ of Certiorari be denied.

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Dated: January 21, 1980.

APPENDIX A.

EXCERPTS FROM SENATE REPORT Calendar No. 456

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-428

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1468

together with

SUPPLEMENTAL VIEWS

NOVEMBER 27 (legislative day, NOVEMBER 15), 1979.—Ordered to be printed

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II. Text of Senate Bill 1468

The text of S. 1468 is as follows:

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

V. Background and Need for Legislation

1. History of contribution generally

The first recorded discussion of the law of contribution can be found in the case of *Merryweather* v. *Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), which established the English common law rule against contribution among joint tort-feasors. In a discussion of the rule, the judge in *Knell* v. *Feltman*, 85 U.S. App. D.C. 22, 26, 174 F. 2d 1662, 666 (1949) stated:

> Due to the brevity of the report and a misleading headnote, the Merryweather case has often been cited in support of the sweeping proposition that no contribution can be had between joint tort-feasors. It is plain, however, that the ruling of the case was limited to the denial of contribution between wilful or intentional wrongdoers.
>
> Nevertheless, after a period of adherence to the true *Merryweather* holding, the majority of American courts have long flatly said there can be no contribution between joint or concurrent tort-feasors, without distinguishing between those who are intentional wrongdoers and those whose unpurposed negligence results in a tort.
>
> Widespread revulsion against that rule, which Chief Justice Groner said "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled," was demonstrated when the legislatures of some fifteen States enacted alleviating statutes in one form or another. Dissatisfaction with the rule is further shown by the fact that many courts have "riddled it with exceptions." [Footnotes omitted.]

A footnote in an article on contribution in the Cornell Law Journal also attempts to deal with *Merryweather* and states that:

> This view [against contribution] however, has been slow to take hold on American jurisdictions, many of which apply the rule [of contribution] equally to intentional and unintentional tort-feasors . . . The basis of the rule, to the

> extent that a rational basis exists, lies in the maxim that "no man can make his own misconduct the ground for an action in his own favor . . . The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it." 63 Cornell Law Review 1978 at 682.

However, the inequity and irrationality of this precedent were too great, and in 1935 England overruled *Merryweather* by statute.

In the United States, the law evolved away from a strict no contribution rule which has simply not satisfied modern requirements of fairness: "The common-law refusal to let . . . loss be spread among all the tort-feasors, because the claimant for contribution is a 'bad-man' and hence not entitled to the aid of the courts, is misplaced prudery," *Gregory, Contribution Among Joint Tort-feasors: A Defense*, 54 Harv. L. Rev. 1170, 1170 (1941). Indeed, the old rule has been rejected in a large majority of American jurisdictions, see generally, *Zapico* v. *Bucyrus-Erie Co.*, 579 F. 2d 714, 718 (2d Cir. 1978).

As described more fully below, the trend toward contribution has resulted from the realization that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). Courts adopting contribution have characterized it as a "rule of reasoned fairness," and indicated that "there is no longer a legitimate place in our system, if indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss." *Gomes* v. *Brodhurst*, 394 F. 2d 465, 467 (3d Cir. 1967). Other courts have explained rejection of the rule in even stronger terms, stating that the reasons for it have been "overborne by recognition of possible collusion between settling defendants and plaintiffs and the realization that fundamental fairness demands a sharing by wrongdoers in setting the wrong right." *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978).

Equally important, courts have recognized that the goal of deterrence will be better achieved by ensuring more comprehensible inclusion of defendants, including intentional tort-feasors. As the Supreme Court said in a recent admiralty case, "[t]he interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful,' " *Cooper Stevedoring, Supra*, 417 U.S. at 111. A more detailed review follows.

A representative State court reaction to the old English rule is *Goldman* v. *Mitchell-Fletcher Co.*, 392 Pa. 854, 141 At. 231 (1928), where the Pennsylvania court stated that *Merryweather* applied only in cases where the wrongdoers intentionally committed the wrong, knowing it was wrongful.

Federal courts, too, began evolving a more reasonable rule. In *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F. 2d 219 (D.C. Cir. 1942), the court refined the *Merryweather* rule so that it applied in cases where "the parties are not intentional and willful wrongdoers, but are made so by legal inference or intendment." Id. at 223. The court in this case did not feel compelled to follow the controlling State law and allowed for contribution. Another key Federal case allowing contribution is *Gomes* v. *Brodhurst* (a negligence action) cited above.

For other Federal cases, see also *Heizer Corp.* v. *Ross, Fed.* Sec. L. Rep. (CCH). ¶ 96,926 (7th Cir. July 10, 1979) and *Kohr* v. *Allegheny Airlines, Inc.*, 504 F. 2d 400 (7th Cir. 1974).

In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the court held that an antitrust plaintiff was not precluded from recovery by its own participation in the antitrust violation on which it sues, at least where it was not a substantially equal participant in the violation. The court stated that "[w]e have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes." 392 U.S. at 138. The court discussed the distinction between a defendant who has exerted more power than another in the conspiracy and concluded that the theory of *in pari delicto* had been in certain cases incorrectly used to bar claims of plaintiffs who were at some degree of fault. As Mr. Justice White stated in concurring opinion:

> When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of Sec. 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N.Y.* v. *Southern Photo Materials Co.*, supra, clearly permit recovery by the less responsible but injured party. 392 U.S. at 145.

The principle of this case, which can be applied generally, is that even if a plaintiff has been a participant in a conspiracy and is found to be partially at fault, that plaintiff is not barred from relief. That is because the public policy interest which is paramount is that of encouraging and maintaining competition.

In *de Haas* v. *Empire Petroleum*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd* in part, *rev'd* in part on other grounds, 453 F. 2d 1223 (10th Cir. 1977), securities case, the court allowed contribution among intentional wrongdoers although the statute did not specifically provide for it. Thereby, the court expressed the opinion that there was a policy that contribution was part of the regulatory framework of the securities laws, whether or not specifically stated in the statute and that contribution should be extended to intentional tort-feasors.

In *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F. 2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), another securities case, the court used the *de Haas* case, *supra*, to support the notion that the common law against contribution among joint intentional tort-feasors has changed to allow it, reasoning that to allow an intentionally guilty defendant to escape its fair share of the liability would actually *dilute* the deterrent effect of the laws.

In a third securities case, the court in *Gould* v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 169 (D. Del. 1974) cited *de Haas* and several other cases in support of the proposition that:

> unlike indemnity, contribution would not interfere with the regulatory purpose of § 14 of the 1934 Act. *On the contrary, the availability of contribution would tend to insure that all*

> *individuals jointly liable for a violation of § 14(a) would have some responsibility for damages.* . . . Were contribution not available, those found liable for breach of a statutory obligation might escape liability as effectively as if they were entitled to indemnity. 387 F. Supp. at 163. [Emphasis added.]

(The other cases cited by the court were *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Herzfeld* v. *Laventhol*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *Altman* v. *Liberty Equities Corp.* 54 F.R.D. 620, 625 and *Globus*).

Also in 1974, the court stated in *Alexander Baldwin Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y.), that:

> *Because of the deterrent policy of the securities laws, even intentional tort-feasors may obtain contribution so that other tort-feasors will not escape liability.* This purpose will be served if defendant tort-feasors are allowed to implead any other tort-feasors involved in the fraud. 385 F. Supp. at 238 [Emphasis added.]

Another case which articulated the policy to allow contribution when the statutory framework is silent is *Odette* v. *Shearson Hammill and Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975). Shearson allegedly sold securities of two shipping companies while in possession of adverse information about them in violation of the securities laws. Shearson sought indemnification under Federal Rule 12(b)(6) from the National Bank of North America. The court denied indemnification but allowed a claim for contribution under Rule 14(a) of the Federal Rules of Civil Procedure, stating:

> Since Shearson may recover contribution for liability under Rule 10b–5, it may also obtain contribution for liabilities under §§ 15(c) and 17(a) which impose similar standards of liability. *A fortiori* it may seek contribution for liability for negligent misconduct under § 12(2). . . . *Id.* at 958.

Relying on *Globus II* (1971), the court stated that the deterrent policy of the securities laws which disallowed indemnification (i.e., shifting of liability), also mandated that tort-feasors other than the underwriter (who was knowledgeable of the wrongdoing) not be allowed to escape from liability for any part of the damages.

When discussing the appropriateness of contribution in the *Muth*[1] case, the court cited *Gould*, *Globus* and *de Hass* in support of the general right of contribution.

In *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977), the court discussed contribution under the admiralty laws.

> In admiralty, joint tort-feasors normally have a right of contribution. . . . The State Highway Department and the United States were joint and equal tort-feasors in accordance with the previous apportionment of fault. (Finding of Fact No. 21). The State Highway Department has settled with the plaintiffs, and accordingly, the plaintiffs cannot subject the Highway Department to any further liability.

---

[1] *Muth* v. *Dechert, Price & Rhoads*, 70 F.R.D. (E.D. PA. 1970).

> Absent a settlement with one defendant, the liability of tort-feasors is joint and several, and the innocent plaintiff can recover his full damages from either tort-feasor. *Id.* at 710.

In *Doyle*, the court discusses the different formulas which settlement can take, and supports the method of reduction by proportionate fault because it effectuates the goal of assuring that all who are liable must pay and that all culpable parties must face the burden of their wrong actions; this should, therefore, deter them from such actions. No party must pay more than his fair share, and settling parties need pay no more than their settlement sum. Thus, settlements, at least from the defendant's perspective, are not deterred.

Under S. 1468, the plaintiff's propensity to settle should also remain unaffected, since the plaintiff continues to measure the likelihood of recovery and the amount of recovery against the certainty of settlement for a lesser sum. Settlement when contribution is available (under any form of contribution) does not deprive the plaintiff of any more potential recovery than does settlement where no contribution is allowed.

The evolution of the court's reasoning in the securities field is no less applicable to antitrust law. That is, in a regulatory scheme, where one of the goals is to deter destructive or illegal behavior, the best way to do so is to require that all of those responsible for the wrong pay their part of the liability. This ensures that no one gets out of the suit without paying for the wrong committed.

Without contribution, there is an incentive for one guilty party (or one otherwise not willing to litigate) to settle quickly and cheaply, leaving others facing a larger share of the damages. This inequity and impediment to deterrence exists whether the tort is intentional or unintentional, and accordingly, contribution should apply to intentional as well as unintentional torts.

The law has not developed as rapidly in the antitrust field as it has in the other areas, in large part because of the total silence of the antitrust statutes on the matter—a silence this committee has determined to remedy. Aside from two or three recent rulings denying contribution against defendants who have settled (consistently with S. 1468 which would do the same), only three courts appear to have considered and discussed the matter thoroughly. In the most recent and fully reasoned case, the Eighth Circuit held that contribution is available. *Professional Beauty Supply, Inc.* v. *National Beauty Supply Inc.*, 594 F. 2d 1179 (8th Cir. 1979). The court indicated that the deciding factor was "fairness between the parties." 594 F. 2d at 1185. But it stressed the deterrent factor as well, noting that "to deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing." *Ibid.*

The court reasoned as follows:

> We believe that sound policy reasons dictate such a result [adoption of a rule which would allow contribution from joint tort-feasors in federal antitrust cases] and accordingly hold that under certain circumstances, an antitrust defendant may be entitled to pro rata contribution from other joint tort-feasors. *Ibid.*

The court went on to discuss the holdings of several courts of appeal that there is no right of contribution in Federal antitrust cases and why the rule barring contribution articulated by these cases may be incorrect, concluding that:

> As a minimum *Cooper Stevedoring* and earlier admiralty cases demonstrate that under certain circumstances the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress. *Id.* at 1183.

To support the contention that a court may fashion a rule of contribution despite statutory silence, the court added:

> We initially note that the antitrust statutes are not purported to be comprehensive and, possibly as a result courts have not been prone to await congressional action to resolve many of the questions left unanswered by these statutes, such as the nature of the cause of action, apportionment of judgments, assignment, survival and limitations. Additionally . . . it is our view that the presence of contribution provisions in the securities laws is some indication that if the question were presented today, Congress would include a right to contribution as part of the antitrust laws. . . . Finally, we find further support for our position from the fact that Federal courts have been willing to formulate rules for contribution in other areas of the law without express congressional direction. *Id.* at 1183–84. [footnote omitted.]

Finally, the court said that adhering to a rule which would have the effect of allowing antitrust violators to escape liability for their wrongdoing undermines the effectiveness of the antitrust laws. *Id.* at 1185–86.

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tort-feasors in an antitrust action. Because of the deterrent policy of the antitrust laws, even intentional tort-feasors may obtain contribution so that other tort-feasors will not escape liability. *Id.* at 1186.

The two most often cited cases denying contribution are not persuasive. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969), relied heavily on the general Federal common law rule, and in particular on an early Supreme Court admiralty law decision which retained little validity after the more recent *Cooper Stevedoring* decision, *supra*.

The court in *El Camino Glass* v. *Sunglo Glass Co.*, 1977–1 Trade Cas. ¶ 61, 533 (N.D. Cal. 1976), reviewed the policy reasons advanced for disallowing contribution—complexity, prejudice of plaintiffs' control over their own cases and discouraged settlements (all discussed more fully below)—and concluded that the arguments in favor of permitting contribution are persuasive. . . ." 1977–1 Trade Cas. at 72, 112. Nevertheless, the court felt compelled to deny contribution because of lack of "congressional intent." [2]

The committee has determined that the time has come to supply the appropriate congressional intent (with respect to price-fixing), and to eliminate the confusion that is likely to result from the conflict

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[2] *See also Wilson P. Abraham Constr. Corp.* v. *Texas Industries, Inc.*, No. 78–1788 (5th Cir. Oct. 16, 1979), a decision just rendered denying contribution in a horizontal price fixing case. The court differed with the reasoning of the *Professional Beauty Supply* case, *supra*, noting, however, that "[o]ur decision in this case is certainly subject to reasonable contrary arguments" and that "[t]hose aggrieved by this decision, always have recourse to Congress a forum better suited to evaluation of the competing interests and policies involved."

between the cases just described. In the absence of congressional direction, it would take many years and several trips to the Supreme Court before the decisional law became clear—a view the courts themselves are now expressing. See *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 939 Antitrust and Trade Reg. Rep. (BNA) E–1, E–4 (10th Cir. 1979), discussed more fully below. It is the conviction of the committee that this is too long to wait, and that the injustice of the present situation calls out for the kind of swift and uniform solution which can only be achieved by legislation.

The issue of conflict aside, the question has been raised, why, if Congress did not provide for contribution in 1914 when enacting the Clayton Act, is there need for congressional action now. The Department of Justice, for example, raised this point in questioning the need for this legislation by observing that the issue did not arise before the President's Antitrust Review Commission. It should be pointed out, of course, that the commission completed its work before the issue became focussed nationally in connection with the *Professional Beauty Supply* case before the massive *Corrugated Container* settlements, which were the largest antitrust judgments in history and which are discussed more fully below, and before the most recent *appellate* decisions underscored the need for congressional direction. Relevant here is the fact that the problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966 and the denial of the pass-on defense in the *Hanover Shoe* [3] case in 1968.

The result, as the record demonstrates, is that the damage sums now being sought—and recovered as settlements—in price-fixing cases are truly staggering. Recent cases have sought damages which literally total in the billions of dollars and which often exceed by many times the net worth of individual defendants. The actual recoveries have also been extremely high. The settlements reached to date in the *Corrugated Container* litigation total nearly $300 million and the case is not yet over. And in the *Plywood* litigation, the three companies that did not settle face over $1.5 billion in potential damages by estimates of plaintiffs' counsel. As will be described more fully below, it is this vast damage exposure that gives rise to the contribution issue. The problem has become especially acute only recently as plaintiffs appear to have recovered more in the last 2 years (nearly $2 billion) than in the previous 50 years. The solution to the problems created by these massive judgments is not, of course, to eliminate the private action, but to see to it that the potential damages are more equally enforced, so that the individual liability, if any, can be more rationally, fairly, and carefully determined.

Critics have questioned whether the legislation should be limited to price-fixing and whether the precise formula set out in S. 1468 will deprive the courts of the flexibility they might need to provide fairness on a case-by-case basis. With respect to the price-fixing limitation, the hearing record and recent case law indicate clearly that price-fixing cases present the most serious problems in need of immediate congressional attention and guidance. On the question of flexibility, the committee determined to provide a certain formula in order to elimi-

[3] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

nate as much needless complexity and litigation as possible in those cases [price-fixing] where the harm to plaintiffs and benefits to defendants are most easily determined on a mathematical [i.e., sales] basis. Contrary to the separate views, there is no need or sanction for a "relative culpability" inquiry into whether a *price-fixing* conspirator was a "leader" or a "passive participant." *See United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948). The committee has no intention of precluding the courts from developing contribution in non-price-fixing cases where case-by-case judicial flexibility is required and appropriate; and the committee feels that the courts will have ample authority to do so in the same manner as they forged contribution rules in securities cases under those sections of the securities laws where Congress made no specific provision therefor.

2. THE STATE EXPERIENCE

The following 19 States have passed statutes permitting contribution patterned after the Uniform Contribution Among Joint Tortfeasors Act (12 U.L.A. 36) (1979 Supp. 1975 ed.).

State	Statutory citation	Date approved
Rhode Island	R.I. Gen. Laws Sections 10-6-1—10-6-11	1940
Arkansas	Ark. Stat. Ann. Sections 34-1001—10-1009	1941
Hawaii	Haw. Rev. Stat. Sections 663-11—663-17	1941
Maryland	Md. Ann. Code Art. 50, Sections 17-24	1941
South Dakota	S. D. Comp. Laws Ann. Sections 15-8-11—15-8-22	1945
New Mexico	N.M. Stat. Ann. Sections 24-1-11—24-1-18 (replaced by N.M. Stat. Ann. 1978 Sections 41-3-1—41-31-8).	1947
Delaware	Del. Code tit. 10, Sections 6301-6308	1949
Pennsylvania	Penn. Stat. Ann. tit. 12, Sections 2082-2089 (replaced, 1978, and re-enacted in 42 Pa. Con. Stat. Ann. Sections 8321-8327).	1951
Mississippi	Miss. Code Ann. Section 85-5-5	1952
New Jersey	N.J. Stat. Ann. Section 2A:53A:1-2A-53A-5	1952
North Dakota	N.D. Cent. Code Sections 32-38-01—32-38-04	1957
Massachusetts	Mass. Gen. Laws Ann. ch. 231B, Section 1-4	1962
North Carolina	N. C. Gen. Stat. Sections 8-1-18-6	1968
Tennessee	Tenn. Code Ann. Sections 23-3101-23-3106	1968
Alaska	Alaska Stat. Section 09.16.010-09.16.060	1870
Nevada	Nev. Rev. Stat. Section 17.215-17.325	1973
Florida	Fla. Stat. Ann. Section 768.31 (West)	1975
Colorado	C.R.S. 1973, Sections 13-50, 5-101—13-50, 5-106	1977
Wyoming	S. C. Sections 1-1-110—1-1-113	1978

The following 18 States have enacted legislation abandoning the common law rule against contribution among joint tortfeasors.

State	Statutory citation	Date approved
Louisiana	La. Civ. Prac. Ann. Arts. 1111-1116	1954
West Virginia	W. Va. Code Ann. Section 55-7-13	1958
Vermont	Vt. Stat. Ann. tit. 12, Section 1036	1970
New Hampshire	N.H. Rev. State. Ann. Section 507:7B	1971
Kentucky	Ky. Rev. Stat. Section 412-030	1973
Texas	Tex. Civ. Code Ann. art. 2212a, Section 2b	1973
Utah	Utah Code Ann. Section 78-27-39	1973
Wisconsin	Wisc. Stat. Ann. Sections 113.01-113.10	1973
Kansas	Kan. Stat. Ann Section 60-258 (a)	1974
Michigan	Michigan Stat. Ann. Section 600.2925	1974
New York	N.Y. Civ. Prac. Section 1401 (McKinney)	1974
Georgia	Ga. Code Ann. Sections 105-2011—105-2012	1977
Idaho	Idaho Code Section 6-803(1)	1977
Minnesota	Minn. Stat. Ann. Section 604.01	1977
Missouri	Mo. Stat. Ann. Section 537.060	1977
Montana	Mon. Code Ann. 1978 27-1-707	1977
Virginia	Va. Code Section 8-01-34	1977
California	Cal. Civ. Proc. Section 875 (Deering)	1978

The following are States whose statutes are silent on the issue of whether or not contribution applies when the tort is intentional: Rhode Island, Arkansas, Hawaii, Maryland, South Dakota, New Mexico, Delaware, Pennsylvania, Mississippi, Massachusetts, Louisiana, West Virginia, Utah, Wisconsin, Michigan, Idaho and Missouri. New York specifically allows contribution for intentional tort-feasors. It would appear that in the absence of any express proviso barring application in the case of intentional tort-feasors, the statutes do apply to intentional torts.

In England, the common law rule against contribution among joint tort-feasors set out in the *Merryweather* case was abandoned when Parliament passed the Law Reform (Married Women and Tort-feasors) Act 1935 (25 and 26 Geo. 5c 30), which applies to all torts and allows contribution. In addition, an English law which is a counterpart to one of our antitrust laws, the *Restrictive Practice Trade Act*, 1976 c.34, allows a party who is aggrieved by an unregistered restrictive action (agreement in restraint of trade or any other anti-competitive action) to bring an action for violation of the statute. Such a violation is technically a breach of a statutory duty, which in English law would have its own statutory remedy. This statute is a "hybrid" offense which characterizes the breach of the statute as "statutory negligence," creating a tort. And as long as a statute gives a party a civil tort remedy, the 1935 Act applies, and contribution is allowed whether or not the violation is intentional.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

In Re Corrugated Container Antitrust Litigation This Document Relates to All Actions Except Civil Actions H-79-87, H-78-2004, H-78-1226, H-78-6718, H-78-1263, H-78-1452, H-78-376, H-78-1815, H-77-2158, H-78-4, H-79-1044, H-79-1086	M.D.L. No. 310

ORDER

Before the court is class plaintiffs' motion for final approval of settlements with twenty-seven defendants[1] in this massive antitrust litigation, in which members of the corrugated industry are alleged to have fixed prices in violation of the Sherman and

1. The settling defendants are: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, McMillan Bloedel (including MacMillan Bloedel Containers, McMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. Non-settling defendants remaining in the class action case are: Alton Box Board Co., Crown-Zellerbach Corp., Fibreboard Corp., The Fibre Box Assn., Georgia-Pacific Corp., Mead Corp., Packaging Corp. of America, Potlatch Corp., Westvaco Corp.; Southwest Forest Industries has reach a settlement agreement which has not yet been submitted to the class.

Clayton Acts. These cases were consolidated in this court for pretrial purposes pursuant to 28 U. S. C. § 1407 in late 1977.

On January 1978 a grand jury sitting in Houston returned indictments against fourteen of the thirty-seven defendants in MDL-310, as well as twenty-six employees of corrugated manufacturers.[2] All but two of the corporations and eight of the individuals indicted entered pleas of nolo contendere and were convicted and sentenced on those pleas. The indictment against one individual was dismissed. The two remaining corporations, Mead and Continental Group, went to trial along with seven individuals; all were acquitted in April 1979.

During the pendency of the government's case, the court first certified a class of direct purchasers in MDL-310 (September, 1978) and then two subclasses; one of container purchasers and one of sheet plants[3] (December, 1978). Discovery was limited during the pendency of the trial of those indicted but was allowed as to grand jury documents and class certification issues.

Two settlements in this case were reached before class certification, with St. Regis and International Paper, on behalf of the whole class, and for a total of $10 million. Nine more were reached, with Union Camp, Boise Cascade, Chesapeake Corporation of Virginia, Diamond International, Longview Fibre, Dura Containers, Champion International (including Hoerner Waldorf), Menasha Corporation, and Willamette, Western Kraft, and Corco, on behalf of the then undivided class, for a total of $68,513,250. These eleven settlements are the "pre-January 5" group which will be referred to throughout this memorandum. Following certification of the sheet plant sub-

2. *U. S.* v. *International Paper, et al,* H-78-11 and *U. S.* v. *Boise Cascade, et al,* H-78-12.

3. A sheet plant is a person, other than a defendant in MDL-310 or their subsidiaries or affiliates, who purchased corrugated sheets, did not itself manufacture corrugated sheets, and did manufacture and sell corrugated containers and/or fillers, pads, and partitions for use in or with corrugated containers. Any class member who is not a sheet plant is in the other subclass.

class, the container purchaser subclass negotiated eleven settlements, with Container Corporation of America, Continental Group, Green Bay Packaging, Inland Container, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging Ltd., and MacMillan Bloedel Limited), Olinkraft, Ownes-Illinois, St. Joe Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, and Weyerhaeuser Company, for a total of $219,530,000. These settlements allocated a possible $14,896,245. to the sheet plant subclass should it desire to participate; it has now applied for an allocation of $11,000,000, which the court has granted. Finally, two "hardship" settlements were negotiated on behalf of the whole class with Consolidated Packaging Corporation and Interstate Container Corporation, for a total of $580,000. With the exception of the last two "hardship" cases, none of the settlements proposed for final approval were negotiated after the beginning of the trial of those indicted. A description of the negotiations has been filed with the court and carefully studied by it.

After the trial of those indicted, notice was mailed to the class, including notice of the proposed settlements. Of the approximately 200,000 members to whom notice was mailed, 210 opted out. Various objections to the settlements were filed, which will be discussed in greater detail below. A pretrial conference was held on December 3 and 4, 1979, to allow a full hearing as to the adequacy and fairness of the settlements. The proponents had filed extensive documentary support and chose not to present further evidence. The objectors were invited to present their arguments and such testimony as they desired; some of them engaged in cross-examination of one of the economic experts whose affidavit had been filed in support of the settlements, and of two attorneys representing sheet plant subclass representatives. This full development of the record has been of great assistance to the court in its determination of the issues presented.

The Proponents' Case

In support of the settlements, proponents have presented the affidavit of an economic expert, Richard C. Hoyt, which indicates that the overcharge by settling defendants to plaintiffs' class was between about two and eight hundred million dollars. This estimate was based on a before-and-after model, using the four years within the statute of limitations as "before" and the years 1977 and 1978, after the grand jury investigation was underway, as "after." The estimate was based on net profits to the settling defendants.

In addition to this economic justification, proponents made the following points in favor of approval: (1) these are partial settlements only, and non-settling defendants remain potentially liable for full damages, less the amount actually paid; (2) the settlements are for a record-making $300 million; (3) they provide for discovery assistance from the settling defendants; (4) they insulate the class from the possibilities of failure of proof at trial, *Illinois Brick* legislation, class decertification, and other potentially harmful events; (5) the settlements are supported by the vast majority of class members and counsel; (6) the settlements (except the "hardship" cases) were negotiated before the acquittals in the trial of those indicted and probably could not be renegotiated at such high figures. Except for Professor Hoyt's conclusions from the economic data, none of the factors favoring approval of the settlements is contested.

The settlement negotiations have been laid before the court in considerable detail and make it clear that they were conducted with authority and at arm's length. The court has previously so found, in preliminarily approving these settlements.[4]

The burden of establishing the fairness, adequacy, and reasonableness is on proponents. *Grunin* v. *International House of Pancakes,* 513 F. 2d 114 (8th Cir.), *cert. denied,* 423 U. S. 864 (1975).

4. Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements (May 30, 1979).

The Objections of Class Members

Several objections were filed by class members. Two members of the Plaintiffs' Steering Committee, one of them representing a class representative,[5] object that there was a conflict of interest inherent in negotiating for container purchasers and sheet plants prior to certification of the subclasses and in negotiating for a sum that may be allocated to sheet plants after that certification. This objection was raised and extensively briefed before this court granted preliminary approval to the settlements, and at that time the court specifically found that there was no conflict as to either the pre- or post-January 5 settlements.[6] Messrs. Specks and Sloan, the attorneys raising the objection, requested an opportunity to cross-examine the three experts who prepared proponents' economic documentation and Messrs. Montague, Hayes, and Susman (the former two being attorneys for two of the sheet plant subclass representatives and the latter the chairman of the Plaintiffs' Steering Committee). This opportunity was afforded to them. All these persons were available and willing to testify. Three of them were called; Professor Hoyt and Messrs. Hayes and Montague.

The testimony of Mr. Montague as to the conflict question was as follows: He originally represented three plaintiffs, two of them container purchasers and one a sheet plant which had gone out of business in the early seventies. He did not participate in the settlement negotiations with St. Regis or International Paper, but after class certification and the naming of his sheet plant

5. The class representative client of the other Steering Committee member supports the settlements. Seven other named plaintiffs' attorneys also signed this objection, and it was separately raised by one absent class member.

6. Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements, pp. 4-6 (May 30, 1979). The issue was raised at that time by one sheet plant representative, Great Northern Packaging. Great Northern did not file any timely objection to the final approval, but announced at the hearing that it wished to maintain its previous opposition.

client as a class representative[7] he functioned as a member of the plaintiffs' Ad Hoc Settlement Committee and participated actively in or was kept informed by phone of all other pre-January 5 settlements. After the motion of Great Northern Packaging for clarification of the class definition or for creation of a separate sheet plant class, he ceased representation of his container purchaser clients. Atlas and Great Northern were named as representatives of the sheet plant subclass in December, 1978. At the urging of Great Northern's attorney, Mr. Hartunian, he agreed that the sheet plants should not participate in any further settlement negotiations until Mr. Hartunian had had a chance to develop data on any possible differences in damages between sheet plants and container purchasers. He further testified that Mr. Hartunian had not ever developed such data and that his, Mr. Montague's, only study as to possibly different measures of damages for the sheet plants was the evidence presented in the trial of those indicted.

Mr. Hayes testified that he represented Rollins Container in a tag-along action transferred to this court, that his client is a sheet plant and buys about one million dollars' worth of sheets and containers per year. He may have spoken with Messrs. Opperman and Susman (members of Plaintiffs' Steering Committee) before filing his suit and certainly did thereafter. He did not apply for Rollins to become a subclass representative; the court asked whether Rollins would be willing to serve in that capacity and after some doubt Rollins consented. He had not made a study as to a possibly different measure of damages for sheet plants but he had discussed the question with Professor Hoyt and knew the ranges of divisions of sales of sheets and containers for the settling defendants. In his opinion and that of his client, damages were only part of the issue as to the fairness

7. At that time, his sheet plant client Atlas Container was the only named plaintiff sheet plant in MDL-310. Subsequently, a tag-along filed by two sheet plants, Great Northern Packaging and Huron Packaging was transferred to this court by the Panel on Multidistrict Litigation.

of the settlements. In response to a question by the court, he stated that he had always considered injunctive relief very important and had so stated to the court during a pretrial conference.[8]

Professor Hoyt's testimony relative to the conflict question was as follows: The net profit figures of settling defendants were not broken down as to sheets and containers, and he made no attempt to separate them. He did not prepare a separate study as to sheet plant damages.

This question of a possible conflict of interest was raised in connection with the preliminary approval of these settlements, and at that time the court determined that no such conflict existed, for the following reasons: First, no inherent conflict has been shown between sheet plants and container purchasers. The decision to carve out a sheet plant subclass was made out of an abundance of caution, not because an inherent conflict had been demonstrated. There are undeniably some differences between sheet plants and container purchasers: sheet plants compete with the defendants in box sales, may themselves have participated in the alleged price-fixing conspiracy, desire injunctive relief as well as damages, and may have a somewhat different measure of damages.[9] The evidence before the court so far however, would indicate that somewhat different interests and problems may exist for many sub-groups—large purchasers versus small purchasers, pre- versus post-statute of limitations purchasers, West Coast purchasers versus those in other parts of the country, purchasers residing in states whose state laws afford differing measures of relief, purchasers from indicted versus unindicted defendants, and so on. It is not practicable to manage

8. The application of the sheet plant subclass representatives for participation in the post-January 5 settlement funds was made only after a consent decree was negotiated with those settling defendants on behalf of the sheet plant subclass.

9. Whether the measure would be greater or smaller is unclear. Evidence presented in the trial of those indicted could support an argument that sheet plants are entitled to less than other purchasers or even, at the extreme, to no recovery at all.

a case subclassed as to all such internal distinctions, and Rule 23 does not require it.[10] Further, all but the first pre-January 5 settlements were participated in by Mr. Montague, representing a sheet plant and designated class representative. There has been no suggestion that the negotiations were not conducted in good faith and at arm's length. The fact that the court ultimately certified a subclass does not, in and of itself, establish that an inherent conflict ever did exist which would vitiate settlements previously negotiated with full authority and in good faith.

The additional evidence adduced from testimony at the settlement hearing underscores the absence of any conflict. Sheet plants have been represented by a sheet plan at all but the initial stages of the settlement negotiations. Their representation has been enlarged and separated from that of the rest of the class as the development of the litigation has afforded the opportunity and the indications for such additional representation. It is nevertheless clear to the court that, except for the negotiation of injunctive relief, additional representation has not added substantive benefits to the subclass. The objectors point out that damages for sheet plants may be different than those for container purchasers, and that no study has been made to determine whether there is such a difference. Neither the objecting sheet plant representative, nor its experts, nor the other sheet plant representatives made such a study, however. This is not surprising, since the objecting sheet plant's experts agreed with the

10. Even if a potential conflict exists, so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes. Wright & Miller, *Federal Practice and Procedure; Civil* § 1768 and cases cited therein at n. 7 and 8. The practice of negotiating a settlement on behalf of one large class which will later be subclassed for distribution purposes is not uncommon. e.g., *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U. S. 871 (1971). Although there have been some assertions that damages are greater than proponents' expert estimates, no one has asserted that more money could have been or could now be obtained from the defendants, or that getting a maximum total fund was not the only motivating factor behind plaintiffs' negotiations on behalf of the entire class.

testimony of proponents' expert that data upon which such a study could be based is unavailable.[11]

The fact is that the funds were acquired pursuant to the entirely common goal of achieving the highest amount possible, and by the time any potential conflict could arise as to division of that fund the sheet plants were separately represented. It is noteworthy that the plan of distribution as to the "hardship" settlements (which no one opposes) is the same as that for the pre-January 5 settlements: sheet plants and container purchasers share on the same basis. Further, the sheet plant allocation from the post-January 5 settlements is based on the fundamental proposition, that all purchasers recover on an equal basis. (The distribution plan is discussed in detail below.)

In sum, as to this alleged conflict, the court can find no sign of prejudice to the sheet plants, or to the rest of the class, either in the negotiations on behalf of the entire class or in the provisions after January 5 for possible allocation to the sheet plant subclass. Nor can it find impropriety or even a superficial appearance of impropriety.

The same objectors also raised questions about several aspects of Mr. Susman's performance of his duties as attorney for a class representative and as chairman of the Plaintiffs' Steering Committee. Mr. Susman filed an affidavit in response which has apparently answered these questions satisfactorily, since objectors did not attempt to controvert the affidavit or even to examine Mr. Susman for further information. The court, too, is satisfied with Mr. Susman's affidavit.

The court is entrusted with a heavy responsibility in a class action and has accordingly explored this issue at greater length than perhaps it deserves. It is a matter frequently of record in this case that an internal struggle within the Plaintiffs' Steering Committee has caused ill will, hard words, dissension and strife.

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11. Report of Drs. John Allen and Roy Gilbert; quantity purchased unknown, p. 2; price index unavailable, p. 4; and affidavit of Dr. Allen.

The attorneys now raising this objection approved the first two settlement agreements. One of them sought certification of the identical large class, with his client (a container purchaser) as class representative. None of the objecting plaintiffs, whose attorneys have been members of Plaintiffs' Steering Committee since its inception, have ever moved this court to provide separate representation for the sheet plants.[12] Inasmuch as internecine conflict among class members may bring to light flaws in the class representation, the court and the class may profit by it; but where in fact the only conflict of interest is a conflict of attorneys' interests, the court also has a duty to ensure that class members do not suffer. To disapprove these settlements on this illusory claim of conflict would work a serious disservice to the class.

Another set of objections and related motions have been filed by certain class members, purportedly on behalf of South Carolina corrugated purchasers, and based upon the requirement of the settlements that a class member release state as well as federal claims. The state antitrust laws of South Carolina, though based on the Sherman and Clayton Acts, provide for a greater measure of damages. Objectors argue from the fact that the state claims were not pleaded and that an action is now pending in state court in South Carolina that this court lacks jurisdiction to approve a final settlement releasing state claims arising out of the alleged conspiracy which is the subject of this suit. The case law is to the contrary. Such releases are reasonable and customary, and without them settlement of large antitrust actions would not be desirable to defendants. *McDonald* v. *Chicago Milwaukee Corp.*, 565 F. 2d 416, 435 (7th Cir. 1977); *Richard's Lumber Supply Co.* v. *U. S. Gypsum Co.*, 545 F. 2d 18, 20-21 (7th Cir 1976), *cert. denied*, 430 U. S. 915 (1977); *Abramson* v. *Pennwood Investment Corp.*, 392 F. 2d 759 (2d

12. The Steering Committee's position on Great Northern's motion to establish a sheet plant subclass was that there was no necessity for it but they did not oppose it. No one at that time dissented from or added to that position.

Cir. 1968). The South Carolina objectors further argue that class notice was defective in that it did not describe the state antitrust laws and did not contain the full text of the settlement agreements. It is clear that this sort of detail is unnecessary and even undesirable in class notice. *Grunin* v. *International House of Pancakes,* 513 F. 2d 114, 122 (8th Cir. 1975); *Gold Strike Stamp Co.* v. *Christensen,* 436 F. 2d 791, 798-99 (10th Cir. 1970). The notice, which included a release, makes plain that state claims will be released by class members. Objectors next request that they be allowed to retain their state claims while remaining in the class as to the federal claims and the settlements. There is no option under Rule 23 to participate in the class and the desirable aspects thereof, such as settlement funds, and opt out as to the undesirable aspects, such as release of claims. *Muldrow* v. *H. K. Porter Co.,* 20 Fed. Rules Serv. 2d 1069 (N. D. Ala. 1975). Of course, anyone who wishes to pursue his claim under state law had the chance to opt out of this class; for those who chose not to do so, the settlements are still fair, reasonable, and adequate. South Carolina case law cited by Judge Chapman in objectors' state case makes it clear that it is very unlikely any court would hold that plaintiffs have a cause of action under the state laws. *Three J Farms, Inc.* v. *Alton Box Board Co.,* 1979-1 Trade Cases ¶ 62,423 at 76,550 (D. S. C. 1978).

A handful of other objections have been raised by these or other class members. The court has given them all careful consideration, although they are not discussed here, and has decided they must be overruled.

The Objections of Defendants

Some of the settling defendants have raised two objections to final approval of their settlements at this time. First, they want to wait until it is absolutely clear that this court's ruling, already affirmed by the Fifth Circuit,[13] that contribution is not available

13. No. 79-2439 (5th Cir., Oct. 30, 1979) (unpublished opinion).

among joint antitrust defendants will not be reversed. Second, they want to wait until it is absolutely clear that the class settlement of all state as well as federal claims will bar any state actions against them. Since the court cannot envision that either unlikely eventuality would entitle settling defendants to rescission or modification of their agreements, these objections are overruled. The settlements were negotiated by very able and experienced lawyers, presumably familiar with the state of the law on contribution and state claims, and it is virtually inconceivable that these two contingencies were not factored in by them.

Non-settling defendants have raised three objections to approval of the settlements. Their standing to object is questionable. *In re Beef Industry Antitrust Litigation* (November 26, 603 F. 2d 1367, 1372-73 (5th Cir. 1979). The court has considered them on the merits, however, for the third time.[14] First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury, and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely. Second, non-settling defendants want class members to be given an opportunity to opt into these settlements but out of the continuing litigation against them. There has been no precedent cited to the court for this novel approach; nor has it been shown that this issue has any bearing on the adequacy, fairness and reasonableness of these settlements. Third, they wish to prohibit plaintiffs from implementing the "most favored nations" clauses of the settlements. As has been repeatedly pointed out in this litigation, the clauses in question are about as toothless as a "most favored nations" clause can be and do not pose any impediment at all to reasonable settlement negotiations with the defendants remaining in the case.

In deciding whether to approve settlements on behalf of a

14. These same objections were raised and overruled in connection with preliminary approval and form of notice.

class, the judge must determine whether they are fair, reasonable, and adequate. The *Manual for Complex Litigation* suggests that the single most important factor to be considered is the strength of the plaintiffs' case in relation to the amount offered in settlement. *Manual* at 56. In this respect, the court must give considerable weight to the fact that the trial of those indicted resulted in acquittal for all defendants, and to the fact that the partial settlements before the court represented a very significant percentage of the total estimated damages to the class.[15] Further factors suggested by the *Manual* are the ability of the defendants to pay (a consideration only applicable to the two "hardship" settlements here); the complexity, length, and expense of further litigation; and the amount of opposition. From the court's extended acquaintance with this litigation, it can say with assurance that continued litigation would be extremely long, complex, and expensive; and that the discovery cooperation clauses will reduce the length and expense to all parties remaining in the case, above and beyond the savings represented by removing the majority of the defendants. As to the settlement opposition, it is noteworthy that far less than one percent of this large class have opted out, and that objections to the settlements were filed by a much smaller number than opted out. The objections have been discussed in detail above and neither by their number nor by their weight do they incline the court to disapprove these settlements. The settlements offer many benefits

15. These calculations use single damages, *City of Detroit* v. *Grinnell Corp.*, 484 F. 2d 448, 458-59 (2d Cir. 1974), and the four year statute of limitations period, In re *Armored Car Antitrust Litigation*, 472 F. Supp. 1357, 1373 (N. D. Ga. 1979); *In Re Anthracite Coal Antitrust Litigation*, 79 F. R. D. 707, 714 (M. D. Pa. 1978). They establish a range of between 170% of actual damages (Professor Hoyt's lowest estimate of damages) to 1.5% (Professor Madansky's estimate of damages, the highest). The court is mindful that a settlement approval hearing is not a trial on the merits, and that the avoidance of necessity for conclusively litigating such questions as the actual damages sustained by the class is one of the main reasons for settlement. *Young* v. *Katz*, 447 F. 2d 431, 433 (5th Cir. 1960). It seems likely that actual damages, if any are found, will be somewhere between these two extremes.

to the class. They provide a very substantial recovery without giving up any claimed damages that may ultimately be proved. They provide for valuable discovery assistance, and they ensure against the many uncertainties of continuing litigation. They were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations. The law favors settlements, and certainly it should favor these.

The Plan of Distribution

The Plaintiffs' Amended Plan of Allocation and Distribution provides that all claimants share in the pre-January 5 and "hardship" settlements on the following basis: all allowed claims will be totalled and the sum divided into the total fund (after deduction of fees and costs), and the quotient will be multiplied by each claimant's total allowed claim to determine his recovery. As to the post-January 5 settlements, the same procedure would be used except that container purchaser subclass members would claim against the total fund less $11,000,000, and sheet plant subclass members would claim only against the $11,000,000. Allowed claims would be for purchases over the entire eighteen-year period covered by the complaint. There were three objections to this plan. Schlitz and A & P objected only that they had not understood it, and after it had been elucidated they withdrew their objection. One class member objected that the claims period should be for less than eighteen years. To shorten the period would prejudice claimants who purchased for the full period, and a pilot study conducted by Arthur Andersen & Co. indicates that the savings in auditing would not be great enough to justify such a limitation. Finally, a sheet plant claimant objects that it must claim only against the $11,00,000 for the post-January 5 settlements although it purchased both sheets and containers. Sheet plants will recover on all purchases, not only

sheet purchases; and the size of the fund has been decided based on the estimated relation between sheet plant purchases and other class member purchases. Of course, any class member's ultimate dollar recovery will depend on how many other claims are filed against the relevant fund, and this cannot be assessed accurately in advance. The distribution plan appears to be fair and has the support of almost all potential claimants.

Therefore, having reviewed the evidence and arguments presented in support of and opposing the final approval of the settlements in these cases, including briefs, affidavits, economic studies and the testimony of class plaintiffs' economic witness and certain counsel, this court hereby FINDS and ORDERS as follows:

1. Each and every objection to the settlement agreements is overruled. The motions of certain South Carolina class members are denied for the reasons set forth herein.

2. The settlements, which require dismissals with prejudice of state and federal claims as set forth in paragraph 3 below, are fair, reasonable and adequate and therefore finally approved.

3. There being no just reason for delay in entering final judgments, such final judgments are hereby entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, dismissing with prejudice all claims of the Container Purchaser Subclass against Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone

Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc.; and all claims of the Sheet Plant Subclass against Boise Cascade Corporation, The Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Diamond International Corporation, Dura Containers, Inc., Hoerner Waldorf Corporation and Champion International Corporation, International Paper Company, Interstate Container Corporation, Longview Fibre Company, Menasha Corporation, St. Regis Paper Company and Union Camp Corporation, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the alleged unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets as alleged in the Unified and Consolidated Complaint on file herein, provided that the court shall retain jurisdiction over discovery disputes between the settlement class and settling defendants as provided by the settlement agreements.

DONE this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
United States District Judge

APPENDIX C.

Excerpt from Appendix "A" to the Letter from J. Albert Kroemer, United States Department of Justice, Antitrust Division, Dallas office, dated July 21, 1978, to All Attorneys in Charge, and filed as a voluntary bill of particulars, listing those individuals whom the United States believes to be co-conspirators in the combination and conspiracy alleged in the indictment:

Green Bay Packaging, Inc.

Ballard, George, Chicago, IL
Briggs, Robert M., Green Bay, WI
Collins, James, Green Bay, WI
Cott, Walter G., Green Bay, WI
Leaman, Don, Ft. Worth, TX
Madson, Mayne M., Chicago, IL
Morgan, William, Ft. Worth, TX
Rollin, James, Ft. Worth, TX
Schwyn, Robert, Kalamazoo, MI
Tiller, Charles, Kalamazoo, MI
Will, Gona R., Kalamazoo, MI

Supreme Court, U. S.
FILED
JAN 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORP., et al.,

Petitioners,

vs.

ADAMS EXTRACT CO., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Union Camp Corporation
U. S. Corrugated Fibre-Box Company

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORP., et al.,

Petitioners,

vs.

ADAMS EXTRACT CO., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The undersigned defendant-respondents respectfully request this Court to deny the petition for a writ of certiorari to review the judgment, entered on October 30, 1979, of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

1. Should this Court create a new cause of action for contribution in antitrust cases when existing legislation does not provide for any such cause of action?

2. Is a new cause of action for contribution necessary or desirable in antitrust cases?

3. Should contribution be permitted against settling defendants in antitrust cases, thereby subjecting them to continuing treble damage exposure in the settled cases?

4. Should defendant-respondents be subject to contribution under the circumstances of this litigation even if such a new cause of action were created at this time?

STATEMENT OF THE CASE

Defendant-respondents and petitioners are named as defendants in most of the more than sixty treble damage antitrust actions which have been consolidated in Houston, Texas, as *In re Corrugated Container Antitrust Litigation* ("MDL-310"). The twenty-nine defendant-respondents to this petition[1] have settled the consolidated class actions for the unprecedented sum of over $300 million in order to avoid the expenses of preparing for and participating in a trial of these tremendously complicated class actions and to eliminate the uncertainties of such a trial, including the risk of an erroneous verdict awarding plaintiffs substantial damages. *See, e.g.*, Boise Cascade Corp. Settlement Agreement, at 2 (Record ("R") Vol. II at 151).

Petitioners have never contended these settlements were inadequate. Indeed, petitioners agree that defendant-respondents entered into their huge settlements in order to avoid the risk of a substantial monetary judgment in these antitrust class actions.[2] *E.g.*, Petition, at pp. 3-4. Although they also

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). While only twenty-seven defendant-respondents are listed in Appendix A to the petition, at least two other defendants, Interstate Container Corp. ("Interstate") and Southwest Forest Industries, Inc. ("Southwest Forest"), have recently settled class actions involved in this petition, would be cross-defendants if the dismissed contribution claims were reinstated, and therefore have a substantial interest in the outcome of this appeal.

2. While substantial damages are claimed, the $5.9 billion figure cited by petitioners is by far the most extreme contention advanced as to the possible amount recoverable by the class. This "estimate" was advanced by a handful of plaintiffs' attorneys in an effort to oppose approval of the record $300 million settlements. Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements (R. Vol. I, Docket Entry No. 645), at 27. The vast majority of plaintiffs' counsel placed the value of this case for settlement purposes, *prior to the verdicts of acquittal in the criminal cases, which were based upon the same allegations as in plaintiffs' complaints,* at between $100 million and $300 million. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements (R. Vol. I, Docket Entry No. 591), at 9. The verdicts should have reduced the attorneys' earlier estimates.

could have settled the class litigation, petitioners determined that they would risk the exposure of a substantial judgment and the expenses of trial rather than pay the settlement amounts sought by plaintiffs.[3]

In light of their continuing possible exposure to damages in excess of the settlement amounts paid, petitioners asserted contribution claims against defendant-respondents. Settling defendants and plaintiffs moved to dismiss these claims with prejudice. On May 30, 1979, the district court dismissed petitioners' contribution claims pursuant to Rule 54(b), Federal Rules of Civil Procedure. R. Vol. II at 412-424.

At the same time they asserted contribution claims, petitioners filed affirmative defenses of "claim reduction," alleging that by virtue of the settlements the class had waived that portion of their claims fairly allocable to settling defendants. These defenses were stricken by the district court's order of May 30, 1979.

Petitioners' separate appeals dealing with the May 30, 1979 rulings were consolidated by the Fifth Circuit. The appellate court also granted defendant-respondents' motion to expedite briefing and oral agreement.

On October 30, 1979, the Fifth Circuit affirmed the district court's dismissal of contribution claims based upon its earlier opinion in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897, *en banc rehng. denied*, 608 F. 2d 524 (5th Cir. 1979) (hereafter *"Abraham Construction"*). The

3. In addition to the absence of Southwest Forest and Interstate from Appendix A, Appendix D to the petition does not include these two unindicted companies' settlements, nor that of Consolidated Packaging Corporation ("Consolidated"), a felony indictee, since they were all executed after January 1979. Despite the absence of contribution (*cf.* Petition, at 4), Southwest Forest settled at approximately the same level (in dollars per market percentage point) at which the second unindicted company listed in Appendix D settled the litigation. At least in part because of financial considerations, Interstate and Consolidated settled at a level below most or all of the settlements in Appendix D.

court of appeals also held that the district court's decision on claim reduction was not appealable. Petitions for rehearing and suggestions for rehearing *en banc* were filed by two defendant-respondents, Weyerhaeuser Company and Willamette Industries, Inc., and by petitioners. Petitioners' motion to permit them to withdraw their rehearing petition was granted by the court this month. The two defendant-respondents' petition is still pending.

Both contribution claims and claim reduction defenses were again considered by the district court in December 1979. Pending contribution claims, filed after the district court's May 30, 1979 order by petitioners and two other defendants, one of which has settled and now itself faces contribution claims,[4] were dismissed with prejudice. Pretrial Order No. 31 (excerpted in Appendix A). The court found that the claim reduction defenses, which had been reasserted after the Fifth Circuit's ruling, were not ripe for decision, holding:

> First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely. Memorandum Opinion and Order, December 21, 1979, pp. 11-12 (excerpted at Appendix B).

Accordingly, petitioners still have available to them at the trial of the class actions in May 1980 the possibility of obtaining what they characterize as "contribution by way of the affirmative defense of claim reduction." Petition, at 6.[5]

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4. Southwest Forest Industries, Inc. See footnote 1, supra.

5. Claim reduction is not contribution. Claim reduction exists in some form in all antitrust cases in which settlements have been reached with alleged coconspirators: a plaintiff's claim against the remaining defendants is always reduced in some amount by reason of settlements. On the other hand, contribution involves a separate cause of action which would be made available to entities found liable for antitrust violations, a new cause of action which would have a substantial impact upon the antitrust laws and antitrust litigation.

While the claim reduction issue is still viable in the district court, the petition seeks to have this Court reinstate the contribution claims. If these claims were allowed, the well-recognized purposes of settlement would be frustrated. Contrary to their understanding when the settlement agreements were executed, defendant-respondents would face additional liability in the settled cases and would be forced to shoulder once again the substantial burdens of litigation. Accordingly, several defendant-respondents have already notified the district court that they would seek rescission of their settlements if contribution were allowed. Denial of certiorari will end this threat to the settlements.

REASONS FOR DENYING THE WRIT

Defendant-respondents respectfully submit that each of the following factors independently supports denial of the petition.

First, the petition should be denied in light of overwhelming precedent recognizing that Congress should determine whether contribution should be permitted in any area of law governed by statute.

Second, the petition should be denied because of pending Congressional antitrust legislation on contribution.

Finally, all but one of the many antitrust cases facing the issue have dismissed contribution claims. Even the lone exception involved only nondefendants, and should not permit contribution against settling defendants. This very limited conflict could be resolved in the near future without this Court's review, and therefore such review is unnecessary at this time.

1. Congress Is the Appropriate Forum for Determining Whether to Create a New Cause of Action for Contribution.

This Court and lower federal courts have held that Congress is far better suited to consider the wisdom of a cause of action for contribution in no way suggested by existing legislation. In

light of this well-established principle, the petition should be denied.

Petitioners have not contended and cannot contend that their claims are in any way recognized by the antitrust laws: there is no provision for contribution in any antitrust statute, the only persons having a cause of action under those statutes being those injured by antitrust violations. 15 U.S.C. §§ 16, 26 (1976). Accordingly, petitioners have attempted to substantiate their claims by arguing that policy considerations support creating a cause of action for contribution in antitrust cases. However, such contribution claims have been rejected in all but one of numerous cases decided to date on this issue.[6] Several of these cases, including the decision relied upon in this case, hold that Congress alone should decide whether a new cause of action for contribution is appropriate. This Court's precedent supports such deference.

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6. Defendant-respondents are aware of the following cases which have decided this issue: *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted* (10th Cir., Dec. 27, 1979); *In re Beef Industry Antitrust Litigation*, M. D. L. No. 248 (N. D. Tex. Sept. 1, 1978) (Appendix C), *aff'd*, 1980-1 Trade Cas. ¶ 63,021, *en banc rehng. denied* (5th Cir. Dec. 21, 1979); *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. ¶ 62,689 (S. D. Tex.), *aff'd per curiam*, No. 79-2439, *pet. for rehng. and suggestion for rehng. en banc pending* (5th Cir. 1979); *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 75-2820 (E. D. La. 1977), *aff'd*, 604 F. 2d 897, *en banc rehng. denied*, 608 F. 2d 524 (5th Cir. 1979); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (1979), *en banc rehng. denied* (8th Cir. April 17, 1979); *In re Fine Paper Antitrust Litigation*, M. D. L. No. 323 (E. D. Pa. Aug. 3, 1979) (Appendix D); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M. D. Ala. June 22, 1979) (Appendix E), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. ¶ 62,717 (E. D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F. R. L. 647 (D. D. C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N. D. Cal. 1976); *Labbee* v. *Wm. Wrigley & Co.*, No. 4029 (W. D. Wash. Dec. 20, 1974) (Appendix F); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969).

Even in cases involving judge-made law, this Court has been reluctant to consider creating contribution rights without Congressional guidance. For example, in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), this Court held:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . . To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. (342 U.S. at 285-86; footnotes omitted.)

This past June this Court determined to defer to Congress on another admiralty contribution matter because of existing legislation which would be affected by the requested ruling. *Edmonds* v. *Compagnie General Transatlantique*, 99 S. Ct. 2753, 2763, *rehng. denied*, 100 S. Ct. 194 (1979) (hereafter *"Edmonds"*).[7]

The policy considerations involved in granting contribution in admiralty negligence actions clearly differ from those in anti-

7. Petitioners attempted to discredit *Halcyon* in the district court by contending it was "repudiated" by *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974). R. Vol. II, p. 354. They softened their language in the appellate court by suggesting that *Halcyon* "was seriously undermined" by that case. Appellants' Brief at 32. Petitioners again cite this case in support of their request that this Court judicially imply a new cause of action for contribution. Petition, at 10-11. However, *Cooper Stevedoring* merely followed "the well-established maritime rule allowing contribution" (417 U. S. at 113), a rule which was traced back to "the 12th Century, and its roots no doubt go much deeper" (417 U. S. at 110). As *Edmonds* demonstrates, *Cooper Stevedoring* did not repudiate the *Halcyon* holding quoted above. 99 S. Ct. at 2763.

trust cases. But the principle of deferring to Congress announced in cases dealing with admiralty rules should apply much more forcefully to contribution proposals for purely statutory causes of action, such as those brought under the antitrust laws. Two of this Court's recent decisions relating to causes of action allowed by the antitrust laws support this principle, and lower court decisions have specifically held that such deference is required as far as contribution in antitrust cases is concerned.

In *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977) (hereafter *"Illinois Brick"*), this Court determined that substantial complications would be introduced in antitrust cases if indirect purchasers were permitted to sue, thereby diminishing the effectiveness of private antitrust lawsuits as a means of enforcing the antitrust laws. Such a cause of action, according to *Illinois Brick,* would not be permitted without Congressional approval. 431 U. S. at 734 n. 14 and 746. When this Court determined in *Illinois Brick* that even persons who may have been injured by reason of an alleged antitrust conspiracy have no cause of action under the antitrust laws in the absence of new legislation,[8] surely a new cause of action for those defendants which are found liable for purported antitrust violations should not be permitted without specific Congressional approval.

This Court also specifically deferred to Congress in *Reiter* v. *Sonotone Corp.,* 99 S. Ct. 2326 (1979) (hereafter *"Reiter"*), when faced with the question of whether a policy argument identical to one raised by petitioners was sufficient to preclude consumer causes of action under the provisions of § 4 of the Clayton Act (15 U. S. C. § 16 (1976)). In opposing such causes of action, certain parties argued that permitting consumers to sue under § 4 would have a deleterious effect on small businesses. Similarly, it is petitioners' position that a new cause of action for contribution is needed in part because small businesses must now either settle antitrust cases or risk being "driven

8. Cf. Transamerica Mortgage Advisors, Inc. v. Lewis, 48 U. S. L. W. 4001 (Nov. 13, 1979).

out of business" due to the adverse impact which the exposure they face in these cases has on their borrowing power. *See, e.g.*, Petition, at 13.[9] The Court responded to such policy arguments by referring them to Congress:

> Finally, respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small business in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed by Congress than to this Court. However accurate respondents' arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in § 4. (99 S.Ct. at 2334.)

Both the Fifth and Tenth Circuits have echoed the philosophy of these precedents this past year. In *Abraham Construction,* 604 F. 2d 897, the Fifth Circuit rejected contribution on the merits and then recognized, in language reminiscent of this Court's recent pronouncement in *Reiter:*

> Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. (604 F.2d at 906.).

The Fifth Circuit followed *Abraham Construction* in its decisions in this litigation and in *In re Beef Industry Antitrust Litigation,* 1980-1 Trade Cas. ¶ 63,021, *en banc rehng. denied* (5th Cir. Dec. 21, 1979).

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9. Petitioners failed to mention that Mr. Kress, whose testimony was cited by petitioners in support of this argument, also stated during the Senate Committee hearings that the problems his company faced in this litigation would not be solved by the bill presently under consideration by Congress (which includes both claim reduction and contribution) because the potential exposure of the case, even if limited to the company's sales, would have forced settlement. Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 42-43 (1979) (statement of George F. Kress) (excerpted at Appendix G). See also Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess., Rept. No. 96-428 (Nov. 15, 1979) at 37 (hereafter "S. 1468 Rept."; excerpted at Appendix H).

Similarly rejecting contribution claims in antitrust cases on the merits, the Tenth Circuit's opinion in *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted* (10th Cir. Dec. 27, 1979) (hereafter *"Olson Farms"*), also directed those seeking contribution in antitrust cases to the Congressional forum:

> Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation. In this regard, we consider it salutary that the overwhelming majority of states in which a right of contribution exists among joint tortfeasors have provided for such a right by statute. (1979-2 Trade Cas. at 79,704; footnote omitted.)

Other antitrust cases also have recognized that Congress should determine whether or not to develop a new rule permitting contribution. In one of the first reported decisions on the issue, for example, the court in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1345 (S. D. N. Y. 1969), held:

> Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation and . . . no such right should be implied.[10]

Only one case, decided by a divided panel, has specifically recognized a limited form of contribution in antitrust cases.

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10. The securities laws permit contribution in sections which create a private cause of action. E.g., 15 U. S. C. §§ 77k(f), 78i(e), 78r(b). The absence of any such contribution provisions in the antitrust statutes has also been a factor in leading other antitrust courts to conclude that only Congress should create contribution rights for antitrust defendants. See Olson Farms, 1979-2 Trade Cas. at 79,701; Abraham Construction, 604 F. 2d at 903.

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F. 2d 1179, *en banc rehng. denied*, (8th Cir. April 17, 1979) (hereafter *"Beauty Supply"*). *See* Part 3, at 12-15, *infra*. However, the opinion suggests that even the *Beauty Supply* majority may not have developed this limited contribution rule had it known that the issue would be before Congress merely a few months after its opinion was rendered. 594 F. 2d at 1184.

As the above cases held, Congress is the proper forum for determining whether contribution should be allowed in antitrust cases. It is respectfully submitted that to require briefing and oral argument on the merits of the petition in light of this precedent would not be a worthwhile expenditure of the time and resources available to this Court. The petition should therefore be denied.

2. Since Congress Is Currently Considering the Merits of Contribution in Antitrust Cases, the Petition Should Be Denied.

Legislation permitting contribution against nonsettling defendants and third parties in price-fixing cases, introduced in May 1979, was favorably reported out of committee and is now being considered on the floor of the United States Senate.[11] Any Court decision on contribution could therefore be of little or no long-term significance, and could conflict with a Congressional decision on this issue. For this reason alone, denial of the petition is justified.

Petitioners' requested cause of action deviates substantially from the one currently under consideration in Congress.[12]

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11. S. 1468 Rept., at 3-5 (Appendix H at 2-6).

12. Petitioner Westvaco Corporation ("Westvaco") was a strong advocate of this legislation before the Senate Committee on the Judiciary. However, the bill reported out of Committee bears little resemblance to the form of contribution sought in this litigation by Westvaco and the other petitioners. The bill would apply only to future cases; petitioners advocate the application of the new cause of action to this litigation. The bill would apply only to price-fixing cases; petitioners apparently advocate a broad rule applicable to all

(Footnote continued on next page.)

Similarly, any other form of contribution considered by this Court could easily conflict in one or more substantive or procedural ways with the form of contribution, if any, which is enacted into law.[13] Even if contribution were created by this Court, the pendency of legislation in this area would still inevitably result in uncertainty in the courts and among parties in antitrust cases until Congress had also acted.[14] Defendant-respondents respectfully submit that to consider creating a new cause of action for contribution in the face of these uncertainties would be a waste of this Court's resources and contrary to clear judicial precedent which has held that courts should defer to Congress on such issues.

3. No Conflict Exists Between the Courts of Appeals Which Would Warrant Granting Certiorari at This Time.

The Eighth Circuit's *Beauty Supply* majority opinion is the only basis for finding that a conflict exists between the courts of appeals on the issue of contribution in antitrust cases. However, that one opinion does not create a conflict sufficient to warrant certiorari at this time, particularly because it created

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(Footnote continued from preceding page.)
antitrust violations. The bill would specifically exempt defendants settling in good faith from contribution; petitioners seek contribution in the class action cases against the settling defendant-respondents.

13. The committee members presenting supplemental views on S. 1468 felt that price-fixing cases could be the very cases for which contribution should *not* be granted. See S. 1468 Rept., at 34-35 (Appendix H at 6-8). Potential variations in the substantive and procedural forms of contribution urged here and before Congress abound.

14. The opinions below recognized that any new cause of action for contribution should not be applied retroactively to these cases. In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. ¶ 62,689 at 77,880 (S. D. Tex. 1979), aff'd per curiam, No. 79-2439 (5th Cir. Oct. 30, 1979). See Weinberg v. Mitchell, 588 F. 2d 275, 278 (9th Cir. 1978) (following Chevron Oil Co. v. Huson, 404 U. S. 97 (1971)).

only a restricted cause of action for contribution under limited circumstances. In addition, since the conflict may be further diminished or even resolved in the near future by reason of the pending legislation or the Eighth Circuit's modification or revocation of this limited cause of action, it should not be reviewed on the merits at this time.

Beauty Supply is the first and only decision which has permitted any form of contribution in antitrust cases. After analysis of such claims on the merits, not one other court has permitted such claims to withstand pretrial motions. Indeed, none of the cases recently decided in other circuits has followed this limited Eighth Circuit rule.[15] In *Abraham Construction* the Fifth Circuit expressly rejected this new contribution rule which permitted an antitrust defendant to sue an entity "not sued by the plaintiff in the main demand." 604 F. 2d at 900. In *Olson Farms* the Tenth Circuit affirmed the dismissal of contribution claims and refused to speculate as to whether "if the question were presented, Congress would include a right to contribution as part of the antitrust laws." 1979-2 Trade Cas. at 79,703. Even before the Fifth and Tenth Circuit decisions were announced, but after *Beauty Supply,* federal district courts in other circuits had also rejected contribution claims. *See* note 6, *supra.*

While a cause of action was created by the *Beauty Supply* majority, it did so in a § 2, Sherman Act case in which only one of two alleged conspirators was named a defendant. The nondefendant, as plaintiff's supplier, may have had "sufficient economic influence to preclude plaintiff from" suing it. 594 F. 2d at 1185. The court permitted the third-party contribution action to proceed against the nondefendant. This cause of action has been interpreted by courts outside the Eighth Circuit to apply only to nondefendants. *See, e.g., Abraham Construc-*

15. *Heizer Corp.* v. *Ross,* 601 F. 2d 330, 331 (7th Cir. 1979), a securities case, merely cited *Beauty Supply* for a general policy proposition, and does not indicate that the Seventh Circuit would permit contribution in antitrust cases. See also note 10, supra.

tion, 604 F. 2d at 900; *In re Fine Paper Antitrust Litigation*, MDL No. 323 (E. D. Pa. Aug. 3, 1979), at 3 (Appendix B).[16] Because all defendant-respondents were named as defendants in plaintiffs' cases, these recent court interpretations would completely defeat petitioners' cross-claims.

In addition, the *Beauty Supply* majority, responding to claims that contribution would inhibit settlements, stated that a rule protecting settling defendants could be fashioned. 594 F. 2d at 1184. Each of the authorities cited in *Beauty Supply* to support this proposition would prohibit contribution against settling defendants. Several recent cases have interpreted the *Beauty Supply* decision to prohibit contribution against settling defendants. *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M. D. Ala. June 22, 1979), *appeal docketed*, No. 79-2667 (5th Cir. July 26, 1979) (Appendix E); *In re Fine Paper Antitrust Litigation*, MDL No. 323 (E. D. Pa. Aug. 3, 1979), at 3 (Appendix D). Thus, even if *Beauty Supply* were also applied to defendants in antitrust cases, it would not apply to settled claims in this or any other litigation.

The Eighth Circuit rule was developed in part because that court felt no Congressional action on contribution in antitrust cases was likely. 594 F. 2d at 1183-84. Whether the Eighth Circuit will change its rule once again by reason of the pending legislation is uncertain. However, it is likely that the Eighth Circuit will further consider its contribution opinion in the near future.[17] The existence of pending legislation on contribu-

16. This view is consistent with many statements in the opinion. For example, the *Beauty Supply* court emphasized throughout its opinion that its decision to permit contribution was being undertaken "so that other violators will not escape liability" (594 F. 2d at 1185) and because the antitrust laws are undermined when "a significant number of antitrust violators . . . escape liability for their wrongdoing" (594 F. 2d at 1185). Defendants in antitrust cases obviously do not escape liability unless they prove their innocence at trial or through pretrial motions to dismiss or for summary judgment.

17. For example, we are informed that the court in *Little Rock School Dist.* v. *Borden, Inc.*, 1980-1 Trade Cases ¶ 63,059 (E. D. Ark. 1979), will soon consider 28 U. S. C. § 1292(b) certification of at least some issues arising from application of the Eighth Circuit's contribution rule in that case.

tion may convince that court to retract or modify its opinion so that the conflict with the other circuits is either eliminated or reduced.

As the only case decided to date which has created a cause of action for contribution, *Beauty Supply* does not demonstrate a dramatic schism between the courts of appeals on this issue. The conflict between *Beauty Supply* and the other decisions is also insubstantial because of the limited nature of the Eighth Circuit contribution rule. Thus, defendant-respondents respectfully submit that the restricted cause of action created by the Eighth Circuit does not represent a conflict which requires review, particularly at this time.

CONCLUSION

Defendant-respondents respectfully suggest that, in accordance with precedent, Congress is the proper forum for deciding whether to permit contribution in antitrust cases. For this Court to review the merits of changing the no contribution rule would be particularly inappropriate at this time, since Congress is studying legislative proposals on the issue and any changes made to the rule could be of little or no long-term effect. In addition, the limited conflict between the circuits does not warrant granting the petition, particularly under these circumstances.

Petitioners' contribution claims have been pending in federal courts for over a year. Denial of certiorari would finally end the uncertainty and litigation over this issue which has threatened much of the $300 million in settlements reached in MDL-310. At the same time, petitioners still have claim reduction defenses in the trial court which, if allowed, would achieve the same result they are seeking through their contribution claims. Accordingly, defendant-respondents respectfully submit that the petition should be denied forthwith.

Dated: January 21, 1980.

Respectfully submitted,

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Counsel for Boise Cascade Corporation *and Also on Behalf of the Following Defendant-Respondents:*

The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Union Camp Corporation
U. S. Corrugated Fibre-Box Company

Appendices

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

In re Corrugated Container Antitrust Litigation This Document Relates to All Actions Except: Franklin Container Corp., et al., (C. A. H-78-671)	M.D.L. No. 310

PRETRIAL ORDER No. 31.

A pretrial conference and settlement hearing was held before the court on December 3 and 4, 1979, to decide whether certain proposed settlements herein should be finally approved, and other matters. The court having studied the various motions, objections, briefs, memoranda, and argument on these issues, makes the following order:

[¶¶ 1-2 omitted]

3. In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, it is hereby ODERED that

a. Defendant the Mead Corporation's complaint attempting to assert a right of contribution in these cases is hereby dismissed with prejudice;

b. All other contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice.

4. For the reasons set forth in the attached Memorandum Opinion, which is incorporated herein by reference, the motion

of class representatives for final approval of settlements with the following defendants is GRANTED: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. All objections to these settlements are OVERRULED.

[¶¶ 5-11 omitted]

DONE and ENTERED this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
United States District Court

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

In re Corrugated Container Antitrust Litigation This Document Relates to All Actions Except Civil Actions H-79-87, H-78-2004, H-78-1226, H-78-6718, H-78-1263, H-78-1452, H-78-376, H-78-1815, H-77-2158, H-78-4, H-79-1044, H-79-1086.	M.D.L. No. 310

MEMORANDUM OPINION AND ORDER.

Before the court is class plaintiffs' motion for final approval of settlements with twenty-seven defendants[1] in this massive antitrust litigation, in which members of the corrugated industry are alleged to have fixed prices in violation of the Sherman and Clayton Acts. These cases were consolidated in this court for pretrial purposes pursuant to 28 U. S. C. § 1407 in late 1977. [. . .]

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1. The settling defendants are: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. Nonsettling defendants remaining in the class action case are: Alton Box

(Footnote continued on next page.)

[Pages 2-10 omitted]

THE OBJECTIONS OF DEFENDANTS

[. . .]

Non-settling defendants have raised three objections to approval of the settlements. Their standing to object is questionable. *In re Beef Industry Antitrust Litigation* (November 26, 603 F. 2d 1367, 1372-73 (5th Cir. 1979). The court has considered them on the merits, however, for the third time.[14] First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury, and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely.

[. . .]

[pages 13-15 omitted]

Done this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
United States District Judge

(Footnote continued from preceding page.)
Board Co., Crown-Zellerbach Corp., Fibreboard Corp., The Fibre Box Assn., Georgia-Pacific Corp., Mead Corp., Packaging Corp. of America, Potlatch Corp., Westvaco Corp.; Southwest Forest Industries has reached a settlement agreement which has not yet been submitted to the class.

UNITED STATES DISTRICT COURT
Northern District of Texas
Dallas Division

In Re: Beef Industry Antitrust Litigation	M. D. L. Docket No. 248
Meat Price Investigators Association, et al., *Plaintiffs,* *vs.* Iowa Beef Processors, Inc., et al., *Defendants.*	CA 3 77-0780-C
Darrell Cameron, et al., *Plaintiffs,* *vs.* Iowa Beef Processors, Inc., *Defendants.*	CA 77-0990-C
Don Ludvigson, et al., *Plaintiffs,* *vs.* Iowa Beef Processors, Inc., et al., *Defendants.*	CA 3 77-1080-C

ORDER DENYING MOTION OF DEFENDANT IOWA BEEF PROCESSORS, INC. TO AMEND ANSWER TO ASSERT CROSSCLAIM

The above matter came on for consideration before this Court pursuant to the motion of defendant Iowa Beef Processors, Inc. to amend its Answer in order to assert a crossclaim for contribution against defendant Spencer Foods, Inc. The Court has received and duly considered the Memorandum filed in support of said defendant's Motion, the Memorandum of defendant Spencer Foods, Inc., in opposition to the Motion, and the Iowa Beef Processors, Inc., Reply Brief in support of the Motion to Amend.

Upon the memoranda of law, and upon this Court's determination that no right of contribution exists under the Federal antitrust laws, and upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED, that the Motion of defendant Iowa Beef Processors, Inc., to amend its Answer to assert a crossclaim against defendant Spencer Foods, Inc., is hereby denied.

ODERED this 1st day of September, 1978.

/s/ William M. Taylor
William M. Taylor
Judge of United States District Court

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

In Re: Fine Paper Antitrust Litigation This Document Relates to: All Actions	MDL 323

MEMORANDUM

McGlynn, *J.* August 3rd, 1979

Six of the defendants in this multidistrict antitrust litigation have entered into proposed settlement agreements with the plaintiff classes.[1] Pursuant to Rule 15(a), Fed. R. Civ. P., this court granted leave to a number of defendants to amend their answers asserting cross-claims for contribution against settling defendants and other defendants. Mead Corporation filed no cross-claim. Rather, on March 10, 1979, Mead instituted a separate action against its co-defendants in the MDL No. 323 actions.[2] In addition, Mead amended its answers in the remaining MDL No. 323 cases, to assert the additional defense that if the tentative settlements between the class plaintiffs and certain other defendants are finally approved by the court, any judgment which may be entered in favor of the classes must be reduced by an amount fairly reflecting any damage inflicted on class members by the settling defendants.

The settling defendants now move to dismiss Mead's claim other cross-claims asserted against them.

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1. The settling defendants are as follows: Boise Cascade Corp., International Paper Co., Potlach Corp., St. Regis Paper Co., Union Camp Corp. and Weyerhaeuser Co.

2. *The Mead Corporation* v. *Boise Cascade Corporation, et al.*, C. A. 79-1022.

The positions asserted by the settling defendants diverge. Four[3] of the six argue that (1) there is no contribution in antitrust cases, and (2) there is no right of contribution against a settling defendant.[4] A fifth settling defendant (Potlach Corp.) filed a separate memorandum arguing for a right of contribution in antitrust cases except against settling defendants.[5] The sixth settling defendant (Weyerhaeuser), in its May 8, 1979 memorandum, also argues that there should be such a right of contribution in antitrust cases, including a right to contribution against settling defendants, but takes the position that this court should implement that right indirectly by crediting nonsettling defendants with an amount insufficient to insure that they will not be held liable for a disproportionate share of any judgment.

For the most part, contribution has not been permitted among antitrust defendants. *In re: Ampicillin Antitrust Litigation,* MDL Docket No. 50 (D. D. C., filed May 30, 1979); *El Camino Glass* v. *Sugglo Glass Co.,* 1977-1 Trade Cases ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.* v. *American Lines, Ltd.,* 298 F. Supp. 1339 (S. D. N. Y. 1969). My research discloses only one appellate decision dealing with the issue. In *Professional Beauty Supply Co.* v. *National Beauty Supply Co.,* 594 F. 2d 1179 (8th Cir. 1979), the court marshalled all the arguments, analyzed them and came down on the side of allowing contribution in antitrust cases "under certain circumstances". 594 F. 2d at 1182. The circumstances of that case are substantially different from those presented here.

The actions presently before this court involve allegations of an industry wide conspiracy in which 15 corporations located

3. Boise Cascade, International Paper, St. Regis and Union Camp.

4. See Memorandum of Certain Settling Defendants in Support of Motion to Dismiss Claims for Contribution, (filed April 9, 1979).

5. See Memorandum by Potlach Corporation (filed April 9, 1979).

throughout the country are defendants in more than 46 separate law suits. The plaintiffs include a nationwide class of private parties, six state entity classes and eleven individual state plaintiffs. In contrast, only one plaintiff and one defendant were involved in *Professional Beauty Supply*, and there the court concluded that considerations of fairness dictate that the entire burden not be placed on one or two tortfeasors "because of the plaintiff's whim or spite or his collusion with the other wrongdoer". 594 F. 2d at 1185. The court reasoned that allowing contribution served the deterrant objectives of the antitrust laws by preventing one of two tortfeasors from escaping liability altogether. This rationale is inapplicable here since there is no suggestion that there are putative tortfeasors who are not now parties to this action.

Indeed, the settling defendants are not about to escape liability but to the contrary, have already contributed to a fund for the benefit of the plaintiffs.

If the moving parties were successful in this manuever to hold in the settling defendants, the uncertainty of their ultimate exposure would require their continued participation in this litigation, thus depriving them of one of the most important benefits of an early compromise. Of course, it would also inhibit further settlements from among the remaining defendants.

Significantly, the court in *Professional Beauty Supply* specifically excluded settling defendants from the scope of its ruling. 594 F. 2d at 1184.

Finally, the requirement that the court approve class action settlements is a sufficient safeguard against the use of economic power by one tortfeasor to obtain settlement terms which cannot be otherwise supported.

I am convinced that this is not a case for the imposition of a rule of contribution. Fairness in this case requires that those

defendants who want to limit their exposure and avoid further expense ought to be permitted to do so.

Accordingly, the motions of the settling defendants to dismiss the claims for contribution will be granted.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

In Re: Fine Paper Antitrust Litigation
This Documents Relates to:
All Actions
} MDL 323

PRETRIAL ORDER NO. 60

AND NOW, this 3rd day of August, 1979, it is hereby

ORDERED that the motions of the settling defendants to dismiss the claims for contribution be and the same are hereby Granted.

By the Court:

/s/ Joseph L. McGlynn, Jr.
Joseph L. McGlynn, Jr. J.

IN THE UNITED STATES DISTRICT COURT
The Middle District of Alabama
Northern Division

State of Alabama; et al,
Plaintiffs,
vs.
Blue Bird Body Company; et al,
Defendants.

Civil Action
No. 75-23-N

ORDER

This cause is presently submitted to the Court after oral argument on motion filed herein March 16, 1979, by Defendants, Blue Bird Body Company, Blue Bird Mid-South, Inc., Eddins Bus Sales, Inc., Thomas Built Buses, Inc., and Everett Equipment Company (hereinafter Cross-Claim Defendants), to dismiss the cross-claim seeking contribution filed herein March 9, 1979, by Defendants, Ward School Bus Manufacturing, Inc., Carpenter Body Works, Inc., Wayne Corporation and Sheller Globe Corporation (hereinafter Cross-Claimants). For the reasons stated below, this Court is of the opinion that said motion to dismiss the cross-claim should be granted and the cross-claim dismissed for failure to state a claim upon which relief can be granted.

This action was filed by a class of school bus purchasers on January 24, 1975, seeking treble damages from certain school bus manufacturers and distributors for alleged violations of federal antitrust laws. This Court originally certified both a nationwide class and a State-wide class of purchasers as Plaintiffs. The

United States Court of Appeals for the Fifth Circuit, after an interlocutory appeal had been taken, held that this action should proceed with a State-wide class but not a nation-wide class. By Order of October 23, 1978, this Court permitted the action to continue with a State-wide Plaintiff class. The Court approved a notice to potential class members on December 8, 1978, which was supplemented by Order of March 19, 1979, to include information concerning a proposed settlement between the Plaintiff class and certain of the Defendants. A hearing is set on June 11, 1979, for approval or disapproval of the settlement.

It has been suggested by Cross-Claimants that this Court withhold ruling on Cross-Claim Defendants' motion to dismiss pending the outcome of *In re: Beef Industry Antitrust Litigation —Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, (N. D. Tex. 1978), now pending before the United States Court of Appeals for the Fifth Circuit. Ordinarily, this Court would be inclined to follow such a suggestion, but in this case, the Court feels withholding ruling would cause the parties considerable additional expense by the necessity of further notice to potential class members and postponement of the hearing on approval of the partial settlement presently set for June 11, 1979. No such additional notice will be required if the Court of Appeals for the Fifth Circuit rules there is no right to contribution under federal antitrust law. If, on the other hand, that Court, pending this suit, recognizes a right to contribution applicable to this proceeding, corrective measures may then be taken in this cause with little unnecessary and additional expense. Consequently, this Court feels an immediate ruling on the motion before it will benefit all parties.

Since the issue before the Court arises on motion to dismiss, the facts alleged in the cross-claim must be accepted as true and the cross-claim dismissed only if it appears Cross-Claimants can prove no set of facts which would entitle them to relief.

Conley v. *Gibson*, 355 U. S. 41 (1957); *Hines* v. *Delta Airlines, Inc.*, 461 F. 2d 576 (5th Cir. 1972).

It appears that federal law governs the issue of the availability of contribution under federal antitrust law. *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Reg. Rep. (CCH) ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Inc.*, 298 F. Supp. 1339 (S. D. N. Y. 1969); see, *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173 (1942). The general rule under federal common law is that contribution is not available against joint tortfeasors. *Edwards* v. *E. I. DuPont de Nemours & Co.*, 183 F. 2d 165 (5th Cir. 1950); *Central Surety & Ins. Corp.* v. *Mississippi Export R. R. Co.*, 91 F. 2d 125 (5th Cir. 1937). Until recently, all the federal courts which had considered the issue had unanimously held that there is no right to contribution under federal antitrust law. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1977-2] Trade Reg. Rep. (CCH) ¶ 61,698 (D. Utah 1977); *Wilson P. Abraham Construction Co.* v. *Texas Indus., Inc.*, No. 75-2820 (E. D. La. 1977); *El Camino Glass* v. *Sunglo Glass Co.*, supra; *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, supra. In a very recent decision, the United States Court of Appeals for the Eighth Circuit reversed the district court's dismissal of a third-party complaint seeking contribution and held that sound policy reasons dictate a rule which would allow contribution from joint tortfeasors in federal antitrust cases. See, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, [1979-1] Trade Reg. Rep. (CCH), ¶ 62,485 (8th Cir. 1979). That Court said, however: "[T]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case." That is specifically the problem which the Court faces in the instant case and may be the "Achilles heel" of that decision.

The Court in *National Beauty Supply* discussed several policy considerations which lead to its conclusion that contribution is

appropriate. "The deciding factor in our decision is fairness between the parties." *National Beauty Supply, supra,* at 76,849. In that case, the defendant attempted to bring into the suit by way of a third-party complaint a party with whom the defendant had allegedly conspired to violate federal antitrust law. The Court concluded that it would be fundamentally unfair to allow one alleged conspirator to bear the entire burden of a loss for which two parties are responsible.

In the opinion of this Court, the question of fairness must be viewed in quite a different light where, as in the instant case, all alleged co-conspirators have been made parties and certain Defendants have entered into a good faith settlement. It should be noted that the same settlement offer which certain Defendants have accepted has been made to all the Defendants, so that it cannot be argued that there has been any collusion between the Plaintiffs and any Defendants.

It is argued by the Cross-Claimants that recognition of a right to contribution would act to deter violations of the antitrust laws. "To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing." *National Beauty Supply, supra,* at 76,849.[1] On the other hand, a contrary argument may logically be made. In antitrust actions where the litigation is almost certain to be complicated, expensive and lengthy, encouraging such settlements puts the plaintiff in a much better position to recover damages against at least some defendants and thereby finance continued litigation against the remaining defendants. Allowing contribution would discourage such settlements and make it much more difficult for the

1. In the instant case, the Court is not faced with a situation where an alleged violator is escaping "all responsibility for its wrongdoing" but is faced with a situation where certain Defendants have entered a good faith settlement with the Plaintiffs and have agreed to compensate the Plaintiffs for their alleged violations.

plaintiff to ultimately prevail. The more difficulty the plaintiff faces, the less likely such suits will be brought, the less likely plaintiffs will succeed, and the less likely would-be violators will be deterred.

It seems significant to this Court that it is the Plaintiffs who have been allegedly damaged by antitrust violations, so that the sensible rule is to let them determine which Defendants to attempt to recover against. The possibility of being singled out for the full burden of a treble damages recovery would seem a much greater deterrent to a potential violator than the knowledge that any damages assessed would be shared with all other violators through contribution. Acordingly, it is

ORDERED by this Court that the Cross-Claim Defendants' motion to dismiss be, and the same is hereby, granted, and the cross-claim hereby dismissed.

DONE this 18th day of May, 1979.

/s/ R. E. Varner
United States District Judge

F-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JACK LABBEE; et al,
Plaintiffs,

vs.

WM. WRIGLEY, JR. COMPANY, et al,
Defendants.

No. 4029

ORDER DENYING DEFENDANTS' MOTIONS FOR LEAVE TO FILE CROSS CLAIMS.

Defendants Wrigley, Life Savers, Colgate-Palmolive, Warner-Lambert and Todd have each filed a motion for leave to file cross claims against defendant Proctor and Gamble. All movants seek the equitable remedy of contribution for a prorata share of any damages which the movants may ultimately be compelled to pay in this action, and some movants also seek contribution for a prorata share of the costs that may be awarded and attorney's fees incurred in defending this litigation.

The Court has read and fully considered the written memoranda submitted by counsel for all parties, and has concluded that defendants' motions should be denied on the rationale and ruling of the Court in *Sabre Shipping Corp.* v. *American President Lines Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969). In that decision it is held that an antitrust defendant, who is or may be found liable in damages, cannot recover contribution from a co-defendant, who is or might have been held a joint tortfeasor, when the claims against the latter defendant have been settled and plaintiff has executed a covenant not to sue said defendant.

The Court has also determined that no useful purpose would be served by the formality of granting leave to file the cross claims

and then dismissing them for failure to state a claim upon which relief can be granted. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the several motions by various defendants seeking leave to file cross claims are denied.

IT IS SO ORDERED this 20th day of December, 1974.

/s/ George H. Boldt
Sr. United States District Judge

G-1

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S. 1468

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1468

JUNE 8 AND 12, 1979

Serial No. 96-27

Printed for the use of the Committee on the Judiciary

[Pages II-41 omitted]

[. . .]

Senator BAUCUS. Thank you.

One quick question, Mr. Kress. If this amendment has been in effect since 1914, would it have addressed the problems you were faced with? Would you have had any of the problems that you are addressing here today?

Mr. KRESS. I feel it is good legislation and I am supporting it. Though it would not solve my problem, it is a step in the right direction.

Senator BAUCUS. Why would it not solve your problem?

Mr. KRESS. Because my liability would still be $75 million to $80 million, so I would be faced with a decision. My creditors would be off my back. I wouldn't have to worry about them. But the family eggs would all be put out on what the jury might do. I am afraid if I were faced with that, I would still have to settle.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

[. . .]

[Pages 44-237 omitted]

Calendar No. 456

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-428

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1468

together with

SUPPLEMENTAL VIEWS

November 27 (legislative day, November 15), 1979.—
Ordered to be printed

U. S. Government Printing Office
Washington : 1979

Calendar No. 456

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-428

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

November 27 (legislative day, November 15), 1979.—
Ordered to be printed

MR. BAYH, from the Committee on the Judiciary, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 1468]

The Committee on the Judiciary, to which was referred the bill (S. 1468) to provide for contribution with respect to damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act, having considered the same, reports favorably thereon, and recommends that the bill do pass. [. . .]

[page 2 omitted]

[. . .]

II. TEXT OF SENATE BILL 1468

The text of S. 1468 is as follows:

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U. S. C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith,

relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

III. Summary of Reported Bill

S. 1468 adds a new section 4I. to the Clayton Act. Subsection (a) provides that any parties subject to liability as defendants in antitrust price-fixing cases under sections 4, 4A or 4C of the Clayton Act may claim contribution from their co-conspirators. The formula for computing each defendant's share of the liability of damages is based upon the sales or purchases of goods or services of such defendant. The liability is therefore based on an assessment of the damages attributable to each defendant's specific relative benefit from the price-fixed sales weighted by the amount of the overcharge as reflected in its individual sales or purchases. Subsection (a) makes clear that a defendant in a price-fixing suit may use the procedural tools of the Federal Rules of Civil Procedure to effectuate its right of contribution in asserting a cross-claim, counterclaim, third party claim or by a separate action, whether or not any other party has brought an action for contribution in the suit. The intent is to retain the policies of both Rule 14(a) of the Federal Rules of Civil Procedure, which encourages joinder of claims and parties in one proceeding, and Rule 42(b), which permits the court to order

separate trials on the contribution issue to avoid undue prejudice to a plaintiff.

Subsection (b) describes the "carve-out" formula by which the court relieves nonsettling defendants of the liability attributable to the sales or purchases of the defendants who settle. In order to effectuate the goal of equitable distribution of the liability among the alleged co-conspirators, the court is instructed to subtract from the claims of the releasor against the nonsettling defendants the greatest of the following three sums: (1) any amount stipulated by the release or covenant given; or (2) the amount of consideration paid for the release or covenant; or (3) treble the actual damages attributable to the settling defendants' sales or purchases of goods or services. This provision also specifies that in single damage cases by the U. S. Government under section 4A, the amount "carved-out" under item 3 above is not trebled.

Subsection (c) provides that a defendant who settles is protected against any liability for contribution with respect to the damage claims of the plaintiffs with whom such defendant settles. This protection becomes effective as soon as the settlement agreement is entered into, but the protection lapses if the agreement is not finally consummated. Subsections (b) and (c) thus provide together that a settling party is not subject to claims for contribution from nonsettling parties and that nonsettling parties are not liable for damages attributable to the settling parties.

Subsection (d) emphasizes that the principles of joint and several liability continue to apply to price-fixing suits. That is to say, the plaintiffs' burdens are not increased. They need still sue only one defendant and collect damages attributable to all (although, of course, that defendant has a claim against the other defendants for contribution). Moreover, the fact that one defendant is insolvent or outside the jurisdiction of the court

does not impair the plaintiffs' rights, although it may adversely affect the defendants' ability to obtain contribution.

Subsection (e) provides that application of this Act will be prospective from the date of enactment. [. . .]

[Pages 6-27 omitted]

SUPPLEMENTAL VIEWS OF SENATORS METZENBAUM AND KENNEDY ON S. 1468.

[Pages 28-33 omitted]

[. . .]

A primary duty of the President's Antitrust Commission was to recommend changes in existing law and procedure which would streamline antitrust litigation. The Antitrust Commission's recommendations for legislative change have been incorporated in S. 390, the Antitrust Procedural Improvements Act of 1979, which passed the Senate on July 20, 1979. The beneficial effect of S. 390 and like measures designed to speed up antitrust litigation would probably be wiped out in price-fixing cases if S. 1468 becomes law.

B. REASONS ADVANCED FOR S. 1468 DO NOT SUPPORT CONTIBUTION IN PRICE-FIXING CASES

The supporters of S. 1468 argue that contribution will distribute liability "more fairly" among price-fixers. This assumes, of course, that some price fixers escape suit by their victims and the subsequent judgment or settlement payment, an assumption that is not borne out by experience. For example, in the *Corrugated Container* case—the case that appears to have spurred the considerable interest in S. 1468—37 defendants are involved. In practice, therefore, if a price-fixing conspiracy is detected, it is usual for all of the participants to be joined as defendants in the private antitrust suits. *See e.g., In re Fine Paper Antitrust Litigation,* M. D. L. No. 323, slip op. at 3 (E. D. Pa. Aug. 3,

1979); *Alabama* v. *Bluebird Body Co.*, No. 75-23-N, slip op. at 4 (M. D. Ala. May 18, 1979).

The supporters of S. 1468 argue further that when deciding whether to join a conspiracy, a potential price-fixer factors into its decision-making calculus the possibility that it may escape liability because of the absence of contribution. While this argument is not completely without merit, it is doubtful that businessmen, who are generally risk averse, would give significant weight to the possibility of escaping damage liability for price-fixing when the downside risk of liability for treble the injury caused by all of the conspirators is so substantial. As one court observed, "[t]he possibility of being singled out for the full burden of a treble damage recovery would seem a much greater deterrent to a potential violator than the knowledge that any damages assessed would be shared with all other violators through contribution." *Alabama* v. *Bluebird Body Co.*, No. 75-23-N, slip op. at 5 (M. D. Ala. May 18, 1979).

C. Contribution Is More Likely to Be Appropriate in Antitrust Cases Not Involving Price-Fixing: the Professional Beauty Supply Case.

Nonetheless, there are antitrust cases which may call for contribution. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir., 1979), is one. In this case, the plaintiff, a wholesaler of beatuy supplies, sued a competing wholesaler for conspiring to monopolize under Section 2 of the Sherman Act. The plaintiff claimed that the defendant had caused a manufacturer of beauty supplies, the alleged co-conspirator, to terminate the plaintiff as one of the manufacturer's wholesalers. The court of appeals declined to follow the previous decisions automatically denying contribution in all antitrust cases. Instead, it directed the district court to determine whether

equitable considerations dictated allowing the defendant wholesaler to obtain contribution from the manufacturer.

In a situation like *Professional Beauty Supply*, allowing contribution may well shift liability to a person who is, in fact, primarily resonsible for plaintiff's antitrust injury. For example, the manufacturer, who was not joined as a defendant in *Professional Beauty Supply*, may have been the dominant party in the conspiracy to terminate the plaintiff as a wholesaler. Unlike the typical price-fixing case, there are serious questions of relative culpability in many other types of cases under the antitrust laws. [. . .]

B. The Need for Mandatory Claim Reduction Has Not Been Demonstrated

[. . .]

Only one witness representing a small company appeared at the hearings on the legislation, George F. Kress, Chairman of the Board of Green Bay Packaging Inc. Green Bay is a defendant which has settled in the *Corrugated Container* case. Twenty-three of the 37 defendants in that case have settled for a total amount approaching $300 million. The district court has preliminarily approved all of the settlements in the case. *In Re Corrugated Container Antitrust Litigation*, M. D. L. No. 310 (S. D. Tex., May 30, 1979) (slip opinion).

Mr. Kress believed he was forced to settle because of earlier settlements by defendants with larger market shares than Green Bay. But it seems clear from his testimony that his company's decision would not have been affected by the availability of contribution or mandatory claim reduction. Indeed, when asked by Senator Baucus whether mandatory claim reduction would

have solved his company's problem, Mr. Kress admitted that it would not have. (June 8, 1979 Tr. at 76) Because the *Corrugated Container* case was a class action with a potential treble damage award, Green Bay would have made the same business decision to settle even if S. 1468 had been law.

In fact, Green Bay made no efforts to settle before class action certification by the court in the *Corrugated Container* case. The potential liability of the defendants became much greater after class action certification. As a result, the plaintiffs demanded and received more in settlement from defendants like Green Bay, who did not reach agreement until after class action certification, than from those who reached agreement before certification. Perhaps most importantly, Green Bay was hardly pushed to the wall by plaintiffs' settlement demands. The settlement amount—in after-tax dollars—was much less than one-third of its after-tax income for one year.

[. . .]

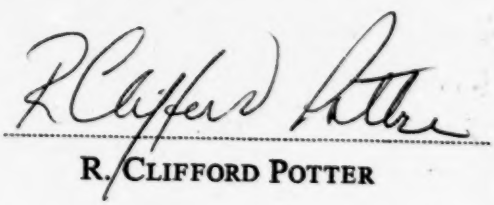
[Pages 38-41 omitted]

[. . .]

HOWARD M. METZENBAUM
EDWARD M. KENNEDY

CERTIFICATE OF SERVICE

The undersigned counsel of record for defendant-respondent Boise Cascade Corporation hereby certifies that on January 21, 1980, three (3) copies of this Brief In Opposition To Petition For Writ of Certiorari To United States Court of Appeals For The Fifth Circuit, filed this day on behalf of certain defendant-respondents in this matter, were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein and first class or air mail postage prepaid, in compliance with Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.



R. CLIFFORD POTTER

Supreme Court, U. S.
FILED
JAN 22 1980
MICHAEL RODAK, JR., CLERK

No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Weyerhaeuser Company and Willamette Industries, Inc., in concurrence with petitioners, respectfully pray that a writ of certiorari issue to review the judgment in this case entered by the United States Court of Appeals for the Fifth Circuit on October 30, 1979.

QUESTIONS PRESENTED

1. Is there a right of contribution so that an antitrust defendant is not faced with the risk of having to bear the entire burden of alleged damages which are only partially attributable to him?

2. Where settlements are involved, is contribution's goal of equitable apportionment of damages among defendants best achieved by carving-out from total damages that share attributable to the settling defendants?

STATEMENT OF THE CASE

Respondents adopt and incorporate by reference petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

1.

There is a square conflict among the Circuits on the issue of contribution in antitrust cases which, unless resolved, will lead to forum-shopping and other abuses.

As petitioners point out, the issue of equitable apportionment of damages among antitrust defendants has produced a clear split of authority among the Circuits. The first Court of Appeals to decide the issue was the Eighth Circuit, which reasoned that fairness requires such equitable apportionment and therefore held that a right of contribution exists in antitrust cases. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979).[1] The Fifth Circuit, however, stated that it was "unable to agree" with the Eighth Circuit's decision and held that antitrust defendants have no right to contribution. *Wilson P. Abraham Construction Corp.* v. *Texas Industries,*

[1] In *Heizer Corp.* v. *Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979), the Seventh Circuit cited *Professional Beauty Supply* with approval and adopted its reasoning in holding that there exists a cause of action for contribution arising out of a Rule 10b-5 case.

Inc., 604 F.2d 897, 900 (5th Cir. 1979), *en banc rehearing denied* (Nov. 29, 1979).[2] The Tenth Circuit also initially rejected the Eighth Circuit's decision, but recently decided to reconsider the question *en banc*. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. 79,699 (10th Cir. 1979), 5 Trade Reg. Rep. (CCH) ¶ 62,995, *en banc rehearing granted* (Dec. 27, 1979).[3]

One especially troublesome consequence of the present division among the Circuits on this issue is the obvious invitation to forum-shop.[4] Particularly in class actions such as this, in which the alleged damages are enormous, plaintiffs undoubtedly will file suit only in those Circuits in which each defendant will be faced with the risk of having to bear the full amount of alleged damages. This will be done to take advantage of the undeniable settlement coercion that results.[5] To eliminate this possibility and to provide much needed

---

[2] The Fifth Circuit panel assigned to this case considered itself bound by *Abraham* and affirmed the district court's dismissal of contribution claims, without analysis, in an unpublished *per curiam* opinion. *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979).

[3] Of the three judges on the original *Olson Farms* panel, the two members of the Tenth Circuit split their votes; one of them filed a dissenting opinion which agreed with *Professional Beauty Supply*. The third judge, sitting by designation, wrote the panel opinion.

[4] The forum-shopping potential is illustrated by recent developments in this case. In light of *Professional Beauty Supply*, defendant The Mead Corporation filed a contribution action in the Eighth Circuit (D. Minn.). The action was transferred to the Fifth Circuit (S.D. Tex.), where it was dismissed. Mead has moved for reconsideration, arguing that Eighth Circuit law (allowing contribution), not Fifth Circuit law (denying contribution), governs its claims. *See Van Dusen* v. *Barrack*, 376 U.S. 612 (1964); *Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402 (2d Cir. 1975); *In re Plumbing Fixtures Litigation*, 342 F. Supp. 756 (J.P.M.L. 1972).

[5] Even the District Court in denying contribution in this case recognized the effect of the risk of enormous damages being assessed against a single defendant: "That this possibility is inherently coercive is undisputable . . . ." *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. 77,878, 77,879 (S.D. Tex. 1979).

guidance to the lower courts on this issue, the Court should grant the writ. *See* S. Rep. No. 96-428, 96th Cong., 1st Sess. 29 (1979) (separate statement by Senators Metzenbaum and Kennedy).

2.

The important issue of equitable apportionment of damages among antitrust defendants should be decided by this Court, especially because serious abuses in the settlement process have developed.

The issue of equitable apportionment of damages is a matter of exceptional significance to parties in antitrust actions and raises questions of fundamental fairness concerning certain practices which have developed in the settlement process.[6] In the absence of such apportionment, plaintiffs in large class actions can enter into relatively cheap, early settlements with the most vulnerable defendants. The plaintiffs can then pursue other defendants for steadily increasing and enormously greater settlement amounts on the threat of liability for all class damages alleged. Defendants who believe they are innocent—and therefore are reluctant to settle at all and certainly unlikely to settle early—are confronted with the Hobson's

[6] As a recent ABA Antitrust Section Report notes, "While there exists in any proceeding a manifest unfairness in exposing parties to substantial liability whimsically imposed, the result of such exposure in large national class action litigation has been overwhelming. Small and regional defendants, maintaining total innocence of wrongdoing and a desire for a trial on the merits, have been confronted with the risk of massive liability based on the national sales of larger defendants. Many such defendants have, as a practical matter, been forced to settle without regard to liability or damage caused. Far from being a hypothetical scenerio, . . . this is a very real problem faced by many companies." American Bar Association, Section of Antitrust Law, *Report on Contribution with Legislative Recommendation* 4 (1979). (Messrs. Kempf and Garten, signatories to this Response, were members of the ABA task force that prepared the initial draft of the Report).

choice of paying an extortionate settlement, at rates far higher than the early settlors, or risking a judgment in the billions of dollars if they go to trial. The enormity of this potential liability is such that, as a practical matter, many innocent defendants are coerced into settlement.[7]

Petitioners' brief graphically illustrates the unfair settlement coercion in this case. One by one, defendants settled for steadily increasing amounts per market share point as the threat of liability for the entire alleged damages grew with each new settlement.[8] In short, the history in this case is one of settlements reached under coercion and without regard to the merits of the lawsuit.[9]

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[7] The facilitation of speedy settlements cannot, of course, justify a rule against equitable apportionment. As this Court stated in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 408 (1975):

> "[A]t bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations."

[8] *See generally* S. Rep. No. 96-428, 96th Cong., 1st Sess. 14-16 (1979) (discussing the unfair "whipsaw" settlements in this litigation). These respondents are all too familiar with the scenario since—unlike petitioners—they have already capitulated to that coercion, paying more than $50 million between them. Respondent Willamette was not even indicted by the federal grand jury which investigated the corrugated container industry. Respondent Weyerhaeuser pleaded *nolo contendere* to the charges brought against it, and the three Weyerhaeuser employees who stood trial were found not guilty.

[9] Opposition to a rule of equitable apportionment based on speculation about its impact on deterrence misses the mark. The issue in this case is not deterrence of the guilty but the imperative need to preserve the opportunity for defendants to defend themselves on the merits at trial. In any event, a rule allowing equitable apportionment

footnote continued on following page

In *Professional Beauty Supply*, where no settlements were involved, equitable apportionment of alleged damages was assured by allowing a right of contribution. In the present action, where some defendants have settled and others have not, equitable apportionment—the objective of contribution—is best achieved through "carve-out" or "claim-reduction." Under this approach, which would eliminate coercion in the settlement process, claims against non-settling defendants would be reduced by carving out, from the potential liability non-settling defendants would otherwise face, that portion of the liability attributable to the settling defendants. Implementation of the Eighth Circuit's *Professional Beauty Supply* ruling in another antitrust case involving settling and non-settling defendants was achieved in precisely this fashion. *Little Rock School Dist.* v. *Borden, Inc.*, 1980-1 Trade Cas. 77, 251 (E.D. Ark. 1979), 5 Trade Reg. Rep. (CCH) ¶ 63,059.[10]

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footnote concluded from preceding page

actually enhances deterrence, as several courts have concluded. *E.g.*, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979); *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974). *See also Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. 79,699 (10th Cir. 1979), 5 Trade Reg. Rep. (CCH) ¶ 62,995 (dissenting opinion), *en banc rehearing granted* (Dec. 27, 1979).

[10] *See Luke* v. *Signal Oil & Gas Co.*, 523 F.2d 1190 (5th 1975) *(per curiam); Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) (Brennan, J.).

CONCLUSION

At stake here is whether the law will tolerate a rule under which an antitrust defendant is faced with the risk of having to bear the entire burden of alleged damages which are only partially attributable to him, and, as a result, can be coerced to pay exorbitant sums unrelated to the merits of plaintiffs' claims. The undersigned respondents join petitioners in urging that certiorari be granted to decide this important issue of federal law on which the Circuits are in conflict.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

This brief is submitted on behalf of petitioners in reply to the briefs[1] submitted in opposition to the Petition for a Writ of Certiorari. Respondents' arguments against granting

1. Two briefs were filed in opposition to the Petition:

(1) "Brief of Respondents-Plaintiffs in Opposition to Petition for a Writ of Certiorari" dated January 21, 1980 ("Pl. Br."), and

(2) "Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit" dated January 21, 1980, filed by certain settling defendants-respondents ("Df. Br.").

In addition, settling defendants-respondents Weyerhaeuser Company and Willamette Industries, Inc. filed a "Response in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" dated January 18, 1980. Three settling defendants-respondents took no position on the Petition. For purposes of this Reply Brief, the term "respondents" does not include Weyerhaeuser, Willamette, and the three settling defendants which took no position.

certiorari are wholly without substance because as demonstrated below: (i) there is a clear conflict among the Circuits on the important issue of contribution in antitrust cases, (ii) contribution is appropriate for judicial resolution in the absence of express statutory provisions, and (iii) respondents' arguments on the merits of contribution support the granting, not the denial, of certiorari.

I.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE OF CONTRIBUTION IN ANTITRUST CASES

The Circuit courts have expressly recognized the clear conflict on the issue of contribution in antitrust cases. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied*, (April 17, 1979) ("*Beauty Supply*"), the Eighth Circuit held:

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.

Beauty Supply, 594 F.2d at 1186.[2]

The conflict was established by the Fifth Circuit, where the court held to the contrary and stated:

> Although we have carefully considered the arguments set forth in the majority's opinion [in *Beauty Supply*], we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897, 900, *en banc rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *petition for certiorari filed sub nom. Texas Industries, Inc. v. Radcliffe Materials, Inc.*, No. 79-1144 (Jan.

2. It is worth noting that plaintiffs-respondents simply excised this passage from the middle of their seventeen-line quotation from the decision, replacing the omitted passage with an ellipsis. *See* Pl. Br. at 3-4.

24, 1980) ("*Texas Industries*"). Similarly, in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted*, (Dec. 27, 1979), ("*Olson Farms*"), Judge Holloway stated in dissenting from the majority's rejection of contribution:

> To me, the sounder and more equitable conclusion was reached by the majority opinion in [*Beauty Supply*] which held, as a matter of federal law, that contribution may be awarded in antitrust actions.

Olson Farms, 1979-2 Trade Cas. ¶ 62,995, at 79,706 (citations omitted).

In a futile effort to demonstrate the absence of this conflict, respondents offer the following three fanciful interpretations of the Eighth Circuit's decision in *Beauty Supply*.

First: Respondents contend that *Beauty Supply* "created only a restricted cause of action for contribution under limited circumstances." (Df. Br. at 12-13; Pl. Br. at 3) This argument is contradicted by *Beauty Supply*, which, in holding that the district court improperly granted a motion to dismiss a third-party complaint seeking contribution from an alleged co-conspirator, established a general rule of contribution in antitrust actions. 594 F.2d at 1186.

Second: Respondents assert that the Eighth Circuit's rule is limited to monopoly cases where contribution is asserted against "nondefendants." (Df. Br. at 13; Pl. Br. at 2-3) This ignores the clear meaning of *Beauty Supply*. Thus, in *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) ("*Borden*"), a district court in the Eighth Circuit relying on *Beauty Supply* decided that

contribution was no less appropriate in price-fixing cases where settlements were involved.[3]

Third: Respondents indulge in speculation that the conflict "may be further diminished or even resolved in the near future by reason of the . . . Eighth Circuit's modification or revocation of this limited cause of action . . . ." (Df. Br. at 13) [4] However, respondents are unable to cite any appeals presently pending in the Eighth Circuit that challenge *Beauty Supply*. Nor is *Beauty Supply* likely to be overruled by the Eighth Circuit in view of the fact *en banc* rehearing was denied.

Accordingly, petitioners respectfully submit that in the light of well-established principles this Court should grant certiorari in order "to resolve a conflict among the Courts of Appeals." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977) (conflict concerning offensive use of pass-on in treble damage actions). *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 208 (1979) (conflict concerning scope of "business of insurance" antitrust exemption); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-93 (1974) ("ostensible conflicts" concerning jurisdictional reach of the antitrust laws).

3. In sharp contrast to the position advanced in plaintiffs-respondents' brief, Stephen D. Susman, lead counsel for plaintiffs-respondents in the present case ("M.D.L. 310"), made the following statement to the court in the *Borden* case concerning the conflict among the Circuits, the importance of the contribution issue, and the likelihood that this Court would grant certiorari:

> Mr. SUSMAN: Because -- let me give the Court the chronology there. Two weeks ago the Fifth Circuit decided a contribution issue in Wilson Abraham v. Texas Industries precisely opposite the Eighth Circuit. There is a clear conflict between the circuits. That issue is going up to El Supremo soon. I imagine -- I know it's being taken up in the Abraham case because of the clear conflict where the Fifth Circuit says, "We decline to follow our brother on the Eighth Circuit." and because of the importance of the issue to the administration of antitrust litigation throughout the country. It seems to me the probability of the court taking that case is great.

Transcript of Conference in *Borden* (October 23, 1979) at 44.

4. Although respondents do not claim that there is any motion or request for certification pending in the *Borden* case, respondents offer the vague hope that the district court may certify under 28 U.S.C. § 1292(b) "at least some issues arising from the application of the Eighth Circuit's contribution rule in that case." (Df. Br. at 14, n. 17)

II.

CONTRIBUTION IS APPROPRIATE FOR JUDICIAL RESOLUTION IN THE ABSENCE OF EXPRESS STATUTORY PROVISIONS

Respondents contend that certiorari should be denied because (i) there is no statute expressly permitting contribution (Df. Br. at 6; Pl. Br. at 9), (ii) "Congress is far better suited to consider the wisdom of a cause of action for contribution" (Df. Br. at 5), and (iii) a bill (S.1468) which would establish contribution in price-fixing cases has been reported out of committee in the Senate (Df. Br. at 11; Pl. Br. at 7). [5] As demonstrated below, these contentions are totally without merit.

A. Because The Antitrust Statutes Are Silent On Contribution, The Federal Courts Should Resolve The Issue

Respondents assert, and petitioners agree, that there is no express provision concerning contribution in the antitrust statutes. (Df. Br. at 6; Pl. Br. at 9) Respondents argue that, for this reason, this Court cannot create a "new cause of action" for contribution. (Df. Br. at 8; Pl. Br. at 8) [6] However, it is precisely this absence of statutory provisions which makes the contribution issue appropriate for judicial review. *See Girouard v. United States*, 328 U.S. 61, 69 (1946); *Funk v. United States*, 290 U.S. 371, 381-82 (1933).

Respondents incorrectly cite *Reiter v. Sonotone Corp.*, 99 S.Ct. 2326 (1979) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977) in support of their proposition that this Court should not decide antitrust issues not specifically addressed by Congress. (Df. Br. at 6-9; Pl. Br. at 7)

5. No further action on S.1468 has been taken, and no counterpart has been introduced to date in the House of Representatives.

6. Contribution is not a "new cause of action", but on the contrary is only a *derivative* claim. *See, e.g., Troutman v. Modlin*, 353 F.2d 382, 386-87 (8th Cir. 1965); *Rowe v. John C. Motter Printing Press Co.*, 273 F. Supp. 363, 365 (D.R.I. 1967). Accordingly, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 48 U.S.L.W. 4001 (Nov. 13, 1979) (Pl. Br. at 10; Df. Br. at 8), which deals only with non-derivative causes of action is not applicable here.

Reiter does not support respondents' position because in that case the Court's holding was compelled by "the plain language" of the statute. 99 S.Ct at 2334. Thus, the Court disregarded what it termed the "ruinous effect" of antitrust consumer class actions on small businesses. *Id.* Similarly, in *Illinois Brick*, this Court did not, as respondents contend, hold that indirect purchaser lawsuits were impermissible because Congress had not authorized them. Rather, the Court decided the merits on non-statutory grounds after concluding that no statutory provision governed. 431 U.S. at 733-34, n. 14.

B. The Federal Courts Give Shape To The Broad Mandate Of The Antitrust Laws By Drawing On Common-Law Tradition

Congress long ago delegated to the federal courts the responsibility for developing the antitrust laws. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court observed:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

Id. at 688 (footnote omitted). *Accord, Beauty Supply*, 594 F.2d at 1183; *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) ("Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.")

In keeping with their role of shaping the development of antitrust doctrine, federal courts have resolved issues, similar to contribution, concerning the allocation of damages and responsibility under the antitrust laws. For example, the application of joint and several liability to antitrust

cases, which respondents mistakenly attribute to Congress (Pl. Br. at 7), was judicially established in *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (effect of releases);[7] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (rejecting *in pari delicto* defense).

C. The Recent Senate Committee Proposal Has No Bearing On The Granting Of This Petition

The pendency of S.1468 (*see* footnote 5, page 5) should not be considered by this Court in exercising its certiorari jurisdiction. In view of the literally thousands of bills introduced in Congress each session which are not passed, and the difficulty of predicting the enactment of any one bill, petitioners respectfully submit that the possibility of some future legislation establishing contribution and eliminating the conflict is of no relevance whatsoever to this Petition.

Indeed, the Senate Judiciary Committee's Report on S.1468 clearly indicates that the full Committee recognized that the contribution issue is both ripe and proper for this Court's review. For example, in the Supplemental Views of Senators Metzenbaum and Kennedy, it was stated:

> [T]he contribution issue is ripe for Supreme Court review through writ of certiorari. The Supreme Court in the near future may well provide the necessary guidance to the federal courts for flexible and fair application of a contribution rule in antitrust cases.

SENATE COMM. ON THE JUDICIARY, REPORT ON S.1468, THE ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S.

7. In *Zenith*, the Court also reaffirmed the principle that plaintiffs are not permitted to obtain a double recovery. 401 U.S. at 348. Thus, contrary to respondents' assertion (Pl. Br. at 5-6), *Zenith* is not inconsistent with applying contribution in antitrust cases. *See Beauty Supply*, 594 F.2d at 1184.

REP. NO. 428, 96TH CONG., 1ST SESS. 29 (1979) ("Committee Report").[8]

In conclusion, there is nothing unique about contribution which would militate against judicial resolution of the issue. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (adopting contribution for admiralty cases); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979) (federal securities fraud cases); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (air disaster cases); *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1967) (negligence cases).

III.

RESPONDENTS' ARGUMENTS ON THE MERITS OF CONTRIBUTION DO NOT SUPPORT DENIAL OF CERTIORARI

Respondents argue (i) contribution interferes with deterrence, settlements, competition and manageability, and (ii) review of the contribution issue in M.D.L. 310 is inappropriate at this time. Neither of these arguments justifies denying certiorari.

A. Arguments On The Merits Of Contribution Are Premature

Numerous arguments on the merits of contribution are raised by respondents, including the effects of contribution on (i) deterrence (Pl. Br. at 4-5), (ii) settlements (*id.* at 6)[9], (iii) competition (*id.* at 11), and (iv) manageability of complex antitrust lawsuits (*id.* at 5). It is obvious that

8. These remarks were omitted from the excerpts of the Report attached to respondents' appendices. *See* Pl. Br. at App. A; Df. Br. at App. H.

9. Among the many misstatements in respondents' briefs are the following. First, the statement that no plaintiff would enter into settlements with "less solvent" defendants if the courts recognized claim reduction, and that courts would never approve such hardship settlements (Pl Br. at 6, n. 3), is, to quote plaintiffs-respondents, "blatantly untrue." (*Id.* at 12, n. 9) In *Borden*, which recognized claim reduction, class plaintiffs represented by Stephen D. Susman, also lead counsel for plaintiffs in M.D.L. 310, entered into a "financial hardship" settlement (Transcript of Conference in *Borden* (October 23, 1979) at 26) which has been preliminarily approved by the district court. (Order preliminarily approving settlement dated January 14, 1980)

(footnote continued on following page)

there are sharp disagreements concerning each of these issues. *Compare Beauty Supply*, 594 F.2d 1179, *with Texas Industries*, 604 F.2d 897. These issues can be resolved only by granting certiorari because denial of certiorari leaves the conflict standing. Therefore, petitioners will not burden this Court with arguments in this brief on "merits" issues.

B. Review Of The Important Issue Of Contribution In This Case Is Essential At This Time

The District Court dismissed petitioners' cross-claims with prejudice and entered final judgment thereon. Pretrial Order No. 13, ¶ 1 (Petition at E-1). Thus, respondents err in suggesting that this Petition be denied because "review should await the full termination of the litigation in the District Court." (Pl. Br. at 13)[10]

It is unquestioned (*see* footnote 3, page 4 and Committee Report) that contribution is currently among the most critical unsettled issues in antitrust law. The importance of this issue alone justifies the granting of the writ. *See* Petition at 10-14.

Unless this Court acts, the question of contribution as asserted in the cross-claims will have been finally decided[11] adversely to the petitioners, and the law of the Fifth Circuit will continue to be no contribution in antitrust cases.

(footnote continued from preceding page)

Second, the statement that "There is thus no substance to Petitioners' claims that any innocent party [in M.D.L. 310] was forced to settle" (Pl. Br. at 12, n. 9) is also untrue. The Continental Group settled for $27.5 million even though the jury in the related criminal case found it to be innocent. (Petition at 12; *id.* at App. D)

10. Furthermore, in stating that certain defendants have already "notified" the district court that they will seek rescission of their settlements if contribution is allowed (Df. Br. at 5, 16), respondents disregard the present status of M.D.L. 310. In fact, the District Court has given final approval to the settlements and overruled the objection of certain settling defendants that final approval should be withheld until the contribution issue is resolved. Memorandum Order and Opinion of December 21, 1979 (S.D. Tex. 1979) (Pl. Br. at B11-12). Df. Br. at B-1 *et seq.* omits this portion of the District Court's order.

11. Contrary to Df. Br. at 4, no petition for rehearing or rehearing *en banc* by any party in M.D.L. 310 authorized to seek such relief is pending in the Fifth Circuit.

CONCLUSION

For the reasons stated herein and in the Petition, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Dated: January 30, 1980

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IN THE

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OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
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v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF PETITIONER WESTVACO CORPORATION IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OCTOBER TERM, 1979

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WESTVACO CORPORATION,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF PETITIONER WESTVACO CORPORATION IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted by Petitioner Westvaco Corporation in response to the Brief for the United States as Amicus Curiae ("Brief") filed on June 2, 1980.

The United States recommends that Westvaco's petition for a writ of certiorari should be granted because of the "very real conflict [that] exists on the general issue of contribution" (Brief at 15) and the desirability

of "much-needed guidance to the lower courts" (*Id.* at 16) in resolving the contribution question. We, of course, agree.

While the United States urges the granting of the petition, it speculates that the Eighth Circuit might have reached the same result in this case as the Fifth Circuit did below because (1) the present case is a price-fixing case in which some defendants have settled and (2) price fixing is "an obviously intentional antitrust violation" (*Id.* at 15). Neither of these purported distinctions provides a basis for distinguishing the fundamentally conflicting decisions of the Fifth and Eighth Circuits:

1. It is pointless for the United States to speculate regarding how the Eighth Circuit would have disposed of the present case if it had applied the principles of its decision in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). The only actual indication of the reach of that decision points precisely in the opposite direction. In *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,059 (E.D. Ark. 1979), the court concluded that *Beauty Supply* applied to a price-fixing case in the context of a settlement to require "release [of] nonsettling defendants from liability for the settling defendant's actions" (*Id.* at 77,252). *See* 937 ANTITRUST & TRADE REG. REP. (BNA) A-30 (Nov. 1, 1979).

2. The suggestion by the United States that there may be a distinction between "intentional" and "unintentional" violations for purposes of contribution is unacceptable and, in any event, irrelevant to the question of whether the petition should be granted. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978), this Court held that intent was an element of a criminal antitrust offense but specifically noted that its analysis

"leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." Furthermore, the possibility of distinguishing between "intentional" and "unintentional" violations for purposes of contribution has been rejected in a thoughtful law review article published only recently. *See* Note, "Contribution in Private Antitrust Actions," 93 Harv. L. Rev. 1540, 1546-48 (1980). This Note concludes, after a thorough and scholarly analysis of all arguments, that contribution in price-fixing cases should be permitted. *See also* Recent Developments, "Contribution Among Antitrust Defendants," 33 Vand. L. Rev. 979 (1980).

At this stage, of course, this Court need not resolve the merits of the arguments presented by the respective parties or the United States. It is sufficient to say, as urged by the United States, that certiorari should be granted in view of the conflicting decisions of the federal appellate courts, the necessity for a uniform federal rule, and the need for an authoritative resolution of this critically important issue.

Respectfully submitted,

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No. 79-972

In the Supreme Court of the United States

OCTOBER TERM, 1979

WESTVACO CORPORATION, ET AL., PETITIONERS

v.

ADAMS EXTRACT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of February 19, 1980.

QUESTION PRESENTED

Whether a participant in an antitrust price-fixing conspiracy may obtain contribution from other participants who have entered into settlements with the antitrust plaintiffs.

STATEMENT

1. Approximately three score private treble-damage actions initiated under Section 4 of the Clayton Act, 15 U.S.C. 15, were consolidated in the United States District Court for the Southern District of Texas *sub nom. In re Corrugated Container Antitrust Litigation*, M.D.L. No. 310. Alleging an 18-year nationwide conspiracy to fix the prices of corrugated containers and sheets, the Unified and Consolidated Complaint of plaintiffs named 37 corrugated container manufacturers as defendants, including petitioners.

On September 6, 1978, the district court certified a plaintiff class consisting of all purchasers of corrugated containers or sheets from defendants from January 1, 1960 to January 25, 1978. Thereafter, 29 defendants negotiated settlement agreements with plaintiffs providing aggregate compensation exceeding $300 million. Petitioners did not settle.

2. Petitioners moved the district court to permit either the assertion of contribution cross-claims against all settling defendants or affirmative defenses that would preclude plaintiffs from recovering the proportion of total damages attributable to the settling defendants. The district court denied the motions. Petitioners, the district court noted, wished to assert rights of contribution and claim-reduction defenses to alleviate the "inherently coercive" litigating environment created by their exposure to hundreds of millions of dollars in damages (Pet. App.

C-2). Observing that defendants representing approximately 80% of the relevant market had previously settled, the district court recognized (*id.* at C-2 to C-3) that petitioners sought insurance against ultimate damage liability in excess of their respective market shares or relative culpability in the price-fixing conspiracy.

For a number of reasons, however, the district court denied the motions. First, defendants would be discouraged from settling antitrust claims, the court explained, if they could be saddled with litigation over the identical claims in contribution actions maintained by non-settling defendants (Pet. App. C-3). Second, a right of contribution in antitrust cases might invite a proliferation of cross-claims that could make the litigation unmanageable, particularly since it might hinder or deter joint defense efforts which conserve judicial resources. The court noted (*ibid.*): "[i]t is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed." Third, the court recognized (*id.* at C-4) that price fixing is an intentional antitrust violation and that contribution rights among intentional tortfeasors are ordinarily disfavored. Finally, the district court declared (*id.* at C-4, C-5) that if a rule recognizing a right of contribution were adopted, it should not be applied retroactively in this case to disturb settlement agreements executed by defendants in reliance on contrary judicial precedent. The court also denied petitioners'

motions to assert claim-reduction defenses.[1] It reasoned that there was no legal barrier to recovery by an injured plaintiff of "all his proven damages from any nonsettling joint intentional tortfeasor, less the amounts actually paid in settlement by other joint tortfeasors" (Pet. App. E-1 to E-2). The court entered a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure only with respect to the dismissal of the cross-claims for contribution.

3. On appeal, the court of appeals affirmed the judgment dismissing petitioners' cross-claims for contribution, relying in a brief per curiam opinion on its prior decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petitions for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (filed Jan. 24, 1980). In *Abraham Construction*, the court held no right of contribution is assertable by an antitrust defendant against coconspirators, irrespective of whether the defendant's violation was intentional or unintentional. The court reasoned that a right of contribution would blunt the deterrent purpose of private treble-damage actions by reducing the maximum liability exposure of antitrust violators and by discouraging private enforcement of

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[1] "Claim reduction" is the reduction of the nonsettling defendants' liability by the portion of the total damages attributable to the settling defendants. The reduction in the liability exposure of the nonsettling defendants could be based on various theories or formulae, *e.g.*, comparative fault, apportionment among all defendants on an equal, or pro rata, basis, or apportionment on a market share basis.

the antitrust laws by escalating costs and complexity (604 F.2d at 901, 905-906). Acknowledging the possibility that denial of contribution might in some circumstances visit inequity on unintentional violators, the court held that this possibility does not justify a distortion of the antitrust laws (*id.* at 906). The court acknowledged that its rejection of contribution "is certaintly subject to reasonable contrary arguments," but in view of the "questionable benefits and * * * possible detriments" of the new rule requested, it concluded that the defendants should seek the new law from Congress, a forum better suited to evaluation of the competing interests and policies involved (*ibid.*).

In *Abraham Construction*, Judge Morgan dissented in part. He agreed with the denial of the right of contribution to defendants who intentionally violated the antitrust laws. He reasoned, however, that denying rights of contribution to unintentional violaters would not buttress deterrence (604 F.2d at 906-907). Moreover, he stated, district courts could be expected to employ the procedural mechanisms authorized by the Federal Rules of Civil Procedure to shelter a plaintiff's treble damage action from the costs and complications of corollary contribution claims asserted by a defendant (*id.* at 907-908). Hence, rights of contribution would not jeopardize incentives for treble damage suits (*id.* at 908). Accordingly, Judge Morgan concluded (*ibid.*), "[a]bsent more convincing proof that a limited contribution rule would compromise the effectiveness of the antitrust laws, I

would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many."

4. In the present case, the court of appeals refused to address the question of whether petitioners Westvaco and Packaging Corporation of America (PCA) could assert defenses of claim reduction. Since the district court had declined to enter a final judgment disposing of the issue, it reasoned, appellate jurisdiction was wanting (Pet. App. B-2).[2]

DISCUSSION

1. The decision of the court below[3] conflicts in principle, although not necessarily in result (see pages 15-16, *infra*), with the decision of the court of appeals for the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (1979). There the Eighth Circuit held that federal law provides a right of contribution by an antitrust defendant against companion violators

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[2] The district court stated it would withhold final decision on the claim-reduction question until the case is submitted to a jury (Resp. Brief in Opp. App. B 12).

[3] See also *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,021 (5th Cir. 1979) (following the ruling in *Abraham Construction*), petition for cert. pending *sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n*, No. 79-1214 (filed Feb. 6, 1980). The *Abraham Construction* decision left open the question whether an antitrust defendant possesses an independent cause of action against co-conspirators who employed coercion or collusion to escape suit by the treble-damage plaintiff. 604 F.2d at 901-902.

in circumstances where contribution would promote fairness among the wrongdoers without undermining the deterrent effect Congress sought to achieve by providing for private treble-damage actions.[4] The court reasoned that an unbending rule against contribution would undercut the deterrent effect of the treble-damages provisions by offering antitrust violators a hope of escaping damage liability completely (594 F.2d at 1185). It observed that procedural mechanisms such as severance were available to protect a plaintiff's treble damage suit from the complications raised by third-party claims for contribution (*id.* at 1184). Finally, it stated that fairness and reason frown on a "rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer" (*id.* at 1185-1186). The court held that the contribution issue should be decided in light of all the circumstances in a particular case, including those identified in another context in Mr. Justice White's concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 146-147 (1968).[5] Noting that the case before

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[4] Except in "unusual circumstances," the court endorsed a rule of pro rata contribution among joint violators to avoid the complexities and threat to antitrust deterrence inherent in a comparative-fault standard. 594 F.2d at 1182 n.4.

[5] In determining whether a treble-damage plaintiff's participation in an antitrust violation should bar recovery against a joint violator, Mr. Justice White stated that the following

it did not involve a joint tortfeasor who had settled in good faith, the court stated that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants" (594 F.2d at 1184). In dissent, Senior District Judge Hanson maintained that the arguments were inconclusive on whether contribution would enhance or reduce the deterrent effect of the private-damage remedy. Consequently, he deemed it unwise to recognize a right of contribution since such a right could dampen the incentives for treble-damage actions by complicating issues and the trial court's managerial tasks. Finding no strong policy favoring contribution and a possible adverse effect from recognizing such a right, he concluded that "this is an appropriate instance to await congressional directive" (*id.* at 1189-1190).

The Tenth Circuit, in *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (1979), denied contribution to an intentional antitrust violator allegedly responsible for only 11% of the purchases tainted by conspiracies to fix prices and to monopolize, rehearing *en banc* granted and

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should be considered: "facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1 [of the Sherman Act]; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement" (392 U.S. at 146-147).

pending, No. 77-2068 (Dec. 27, 1979).[6] Unlike the Fifth Circuit, however, it held open the possibility that an "unintentional violator," in certain circumstances, might be entitled to contribution.[7] See *id.* at 79,704 n.15.

2. The question presented is substantial. The threshold issue is whether, and the extent to which, the federal courts in exercising their federal common-law powers have the authority to create a private right of action for contribution under the antitrust laws. On the one hand, this Court has held that federal courts are empowered in certain circumstances to create legal rules, rights and defenses under federal common law in furtherance of federal interests acknowledged in statutes or the Constitution.[8] Indeed the Fifth, Eighth, and Tenth Circuits

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[6] Judge Holloway dissented from the majority's refusal to permit contribution claims by intentional wrongdoers.

[7] The Seventh Circuit in *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (1979), a securities case, voiced support for the fairness rationale advanced by the Eighth Circuit in *Professional Beauty Supply* to justify a rule permitting contribution in appropriate circumstances. *Heizer* held that a right of contribution is available to joint violators of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j, and Rule 10b-5 issued thereunder.

[8] See, *e.g.*, *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), (recognizing damage action for violation of the Eighth Amendment proscription of cruel and unusual punishments); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (recognizing damage action for violation of Fourth Amendment rights); *Davis* v. *Passman*, 442 U.S. 228 (1979) (recognizing damage action for violation of Fifth Amendment protection against gender discrimination); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103-108 (1972) (endorsing a

apparently assumed that such authority exists in the cases we have discussed. On the other hand, it is arguable that a right to contribution in this statutory context may be fashioned by the courts, if at all, only as an implied right of action under the Sherman Act or the Clayton Act and not in the exercise of the limited common-law powers of the federal courts. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). If so, an implied right of action for contribution would arguably be inconsistent with the four-factor test of *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[9]

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federal common law of nuisance); *Snepp* v. *United States*, Nos. 78-1871 and 79-265 (Feb. 19, 1980) (imposing fiduciary duties on certain government employees and a constructive trust on the profits obtained from a violation of such duties); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (directing courts to apply federal common law in contract actions arising under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185); *Vaca* v. *Sipes*, 386 U.S. 171, 197 & n.18 (1967) (acknowledging power to fashion a rule of joint and several liability for violations of a statutory duty of fair representation and breach of contract); *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 57-60 (1973) (recognizing right of the United States to attack the validity of a patent in antitrust litigation where the patent would be an obstacle to fashioning appropriate relief); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (permitting a patent licensee to assert a defense of illegality under the Sherman Act in a contract action by the licensor seeking unpaid royalties).

[9] For example, it could hardly be said that an antitrust violator is, in that capacity, an intended beneficiary of any of the antitrust laws. See 422 U.S. at 78. Compare *Perma Life*

Under the latter view, only Congress and not the federal courts, would be empowered to establish a right of contribution in antitrust cases. Cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra,* 392 U.S. at 138, 139.

A third possibility would be to hold that failure of an implied right of contribution to meet the standards of *Cort* v. *Ash* would not wholly deprive the courts of power to order contribution, but would be a reason substantially to restrict the exercise of such power—for example, to only the most compelling circumstances in order to avoid manifest injustice. A rationale for the approach might be that the standards of *Cort* v. *Ash* should govern any attempt to seek contribution in alleged furtherance of the policies of the antitrust laws or as a routine matter in antitrust litigation, but that, apart from those standards, the courts may properly supplement the remedies authorized by the antitrust laws to prevent peculiar injustices that Congress may not reasonably have foreseen in anticipating the ordinary application of those laws.

If the federal courts have the authority to fashion a right of contribution in antitrust cases, the next question is the extent to which, if at all, such a right should be recognized. Here too the question is substantial. On this issue, a number of factors have been examined by the courts in antitrust cases: (i)

Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) (permitting a treble-damage claim by a participant injured by the violation).

the impact of a rule of contribution on deterrence of antitrust violations, (ii) the extent to which a rule of contribution would make private actions unmanageable, and (iii) the extent to which denial of contribution is unfair. Concerning deterrence, the Eighth Circuit concluded that contribution would enhance the deterrent effect of the antitrust laws by insuring that no violator goes "scot free." 594 F.2d at 1185. The Fifth Circuit, however, concluded that a rule of contribution would lessen deterrence by decreasing maximum damage exposure. 604 F.2d at 901.[10] While there is at present little empirical evidence on which to base a judgment, we think the Fifth Circuit is more likely correct. We think it unlikely that many violators, particularly large firms, are encouraged to violate the law in the belief that if the violation is discovered they will get off free while somebody else will be stuck with the damage tab. To the extent that the no-contribution rule has any effect on potential intentional violators, we think it more likely that the possibility of having to pay a disproportionately large share of the damages encourages adherence to the law. At the least, we think it unlikely that recognizing a right of contribution would increase the deterrent effect of the law. In-

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[10] The knowledge that all of one's conspirator-competitors will have to pay damages also may reduce the deterrent effect since a violator need not worry that it could be competitively disadvantaged if it had to pay a disproportionately large damage award.

deed, a soon-to-be-published legal and economic analysis of the question concludes that it would not.[11]

Concerning the complicating effect of a right of contribution on litigation manageability, both circuits recognized that allowing contribution might increase litigation complexity to the detriment of both plaintiffs and the courts.[12] The Eighth Circuit felt, however, that unfairness to plaintiffs could be avoided by the appropriate use of severance and other litigation management powers possessed by the district courts. 594 F.2d at 1184. The Fifth Circuit was not so sanguine; it feared that at least some adverse impact on litigation management would result despite the best efforts of the district courts. 604 F.2d at 905-906. It is our view that a right of contribution would entail substantial risks for both plaintiffs and the courts of increased complexity in private damage litigation.[13]

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[11] Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, presently scheduled for publication in the October 1980 issue of The Journal of Law and Economics.

[12] This Court has expressed concern over rules that might unduly complicate the treble-damage remedy and thereby reduce its effectiveness. *E.g., Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 732, 740-745 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968).

[13] If sued defendants are allowed to implead additional defendants, the size and complexity of the plaintiff's typically formidable litigation burdens certainly will increase even more. Moreover, if a right of contribution is recognized, companies not named as defendants might seek to intervene

Concerning fairness, both circuits recognize that imposing a damage burden on some defendants in excess of their relative fault or benefit received while allowing other violators to go "scot free" or to pay lesser damages, may seem unfair. Similarly, both courts agreed that under a no-contribution rule there is a possibility (which we would regret) that some innocent defendants might be coerced into settling because of the increased liability to which they are exposed as a result of earlier settlements.[14] The Fifth

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where plaintiff has charged an industry-wide conspiracy. Such potential intervenors may believe their chances of defeating the plaintiff are better than their chances of beating the original defendants, who are likely to know better than the plaintiff the identity and role of all the co-conspirators. Moreover, as the district court in this case noted (Pet. App. C-3), any adversary relationship between the defendants may deprive the courts of at least some of the liitgation efficiencies engendered by joint defense efforts. Even if settling defendants are protected from contribution, allowance of a claim-reduction defense will increase the plaintiff's litigation burdens. In addition to proving a violation and the total amount of damages suffered, class plaintiffs also would have to litigate additional issues relevant to the share of the total damages attributable to settling and nonsettling defendants. Absent a rule by which total damages are allocated on a pro rata basis between settling and nonsettling defendants, class plaintiffs will have to litigate the allocation of damages among all defendants to protect their claims from being unduly reduced by overstatements of the settling defendants' share of the market.

[14] This concern arises as much from the lack of a claim reduction defense as the no-contribution rule. If the total damages found were reduced by the amount attributable to the settling defendants, under one of several formulae, the liability exposure of any innocent (or remaining guilty) defendant would be reduced. On the other hand, such a rule would reduce incentives for settlements.

Circuit concluded, however, that the incidence of such unfair results has not been sufficient to warrant sacrificing antitrust deterrence or risking increased litigation complexity. The Eighth Circuit, having reached different conclusions on the deterrence and litigation manageability questions, deemed the elimination of unfair results a sufficient reason to recognize a right of contribution in some circumstances. While we recognize that contribution arguably may enhance fairness in some circumstances, we do not regard as in itself unfair the principle of joint and several liability for the consequences of concerted intentional misconduct—which is the general rule for both criminal and tort liability in our legal system.

In short, the question whether a rule of contribution is warranted is a substantial question.

3. Although a very real conflict exists on the general issue of contribution, the immediate case does not necessarily present an occasion to resolve the conflict. Since this case involves settling defendants charged with price-fixing—an obviously intentional antitrust violation [15]—it is probable that the Eighth Circuit would have reached the same result here as did the Fifth Circuit.[16] As mentioned, the Eighth Circuit indicated that it would not enforce contribution against settling defendants. 594 F.2d at

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[15] Traditionally, contribution has not been allowed for intentional torts. See *Restatement (Second) of Torts* § 886 (A) (3) (1979).

[16] The other two cases presently pending on petition in this Court (see note 3, *supra*) similarly involve price fixing.

1184. But, since we believe that postponement of review by this Court will result in a considerable expenditure of judicial resources and forum shopping without a commensurate increase in elucidation of the issues, staying review for a more propitious case would be a costly procedure for both the judiciary and litigants.[17]

We believe certiorari should be granted. No matter how the Court were to resolve the issues, either by holding that the federal courts lack power to establish a right of contribution in antitrust cases, or by upholding the courts' authority, be it broad or narrow, to create such a right, the Court's discussion of the relevant factors in fashioning a rule of contribution would provide much-needed guidance to the lower courts as such cases arise.

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[17] The propriety of recognizing a right of contribution in antitrust cases clearly has divided the appellate judges who have ruled on this issue. It is likely that the issue will be raised with increasing frequency in private antitrust litigation, both in those circuits which have not ruled on the issue and in those which allow it. An authoritative resolution of the issues by this Court would thus save judicial resources, foster the uniformity desired on a question of federal law, and avoid forum shopping.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 79-972

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fiftn Circuit

MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

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MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

The Mead Corporation ("Mead"), through undersigned counsel, hereby moves for leave to intervene as a party petitioner to protect its interests and to preserve this Court's jurisdiction in Westvaco Corporation, et al. v. Adams Extract Company, et al., No. 79-972. Grounds for this motion are:

1. This Court granted the petition for certiorari of Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation"), and Georgia-Pacific Corporation ("Georgia-Pacific"), defendants in the Corrugated Container Antitrust Litigation, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution in antitrust cases.1/

2. Until September 3, 1980, Westvaco was the only defendant other than Mead which had not settled the class action cases which were consolidated in M.D.L. 310. Westvaco has now reached a settlement agreement with plaintiffs.2/ Mead is the only nonsettling defendant in the class action cases. On September 13, 1980, after a three-month trial, a jury returned an adverse verdict to Mead, although no final judgment has yet been entered. Plaintiffs claim that Mead, which has approximately a 2 1/2% market share, is nevertheless liable on the basis of industry wide sales. Thus, Mead is now the

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1/ On August 28, 1980, Mead filed a motion and brief as amicus curiae in support of petitioners.

2/ At the insistence of plaintiffs, Westvaco agreed as a condition of settlement to use its best efforts to dismiss the petition for certiorari granted by this Court in this appeal.

principal real party in interest on this appeal and is most directly affected by the contribution issue.3/

3. In the district court, petitioners filed motions to assert cross claims for contribution and an affirmative defense of claim reduction, the denial of which gave rise to this appeal. Mead, however, filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, The Mead Corporation v. Alton Box Board Co., Civil No. 4-79-245, alleging the same rights of contribution and claim reduction sought by petitioners. The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civil No. H-79-1436). Subsequently, plaintiffs filed a motion to dismiss which the district court granted on December 21, 1979. Thereafter, on January 2, 1980, Mead filed a motion for reconsideration, but the district court has never ruled on that motion. Accordingly, no final appealable order was entered by the district court from which Mead could appeal. But for the absence of a final appealable order, Mead would also be a petitioner on the appeal before this Court.

4. There is no question that Mead has standing to complain of the ruling by the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of petitioners' cross claims for contribution. The test as stated in Baker v. Carr, 369 U.S. 186, 204 (1962), is:

> Have the appellants such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

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3/ Neither petitioners nor Mead has settled the cases filed by plaintiffs which opted out of the class actions.

> sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions? This is the gist of the question of standing.

As the only nonsettling defendant in the class actions of M.D.L. 310, Mead unquestionably has a personal stake in the outcome of the controversy before this Court and has previously asserted its rights to contribution and claim reduction in M.D.L. 310.

5. Mead has always had a vital and legitimate interest in the appeal before this Court and now has the most interest. It should be permitted to intervene as a party petitioner to protect its interests and to preserve this Court's jurisdiction to decide this important issue under the federal antitrust laws. Mead submits that imperative reasons exist in this case for intervention: (a) Westvaco had been a defendant along with Mead in the trial of the class actions in M.D.L. 310, but after three months at trial it was announced in court on September 3, 1980 that Westvaco had reached a settlement agreement with plaintiffs; (b) Packaging Corporation and Georgia-Pacific had previously settled the class action cases; (c) Mead, as the only nonsettling defendant in the class action cases, has the paramount interest in the resolution of the issue on which this Court granted certiorari; (d) it is our understanding that respondents intend to move to dismiss the petition as moot; (e) Mead's interests would be severely prejudiced and may otherwise be lost unless intervention is permitted on this appeal. This Court has for far less compelling reasons in the past permitted intervention in cases already pending to persons who had not been parties to the proceedings below but who had a vital interest in the issue on which certiorari was granted. Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968); NLRB v. Acme Industrial Co., 384 U.S. 925 (1966); Rogers v. Paul, 382

U.S. 198 (1965); Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194 (1944); United States v. Terminal Railroad Association, 236 U.S. 194 (1915). In granting intervention, this Court in Mullaney v. Anderson, 342 U.S. 415, 417 (1952), stated:

> To grant the motion merely puts the [intervenor], the real party in interest, in the position of [petitioner]. The addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration. . . .

The interests of justice and judicial economy would best be served by permitting Mead to intervene.

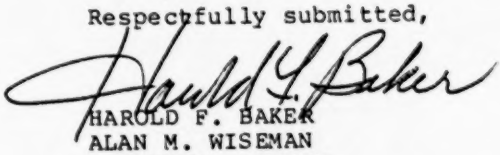
6. There is a concrete case and controversy, as required by Article III of the United States Constitution, between Mead and respondents concerning the precise issue on which this Court granted certiorari. Sosna v. Iowa, 419 U.S. 393, 402 (1975) (class action continues to be justiciable as to a named defendant who might still be affected by a judgment even though the case becomes moot as to some of the original parties); Bank of Marin v. England, 385 U.S. 99 (1966) (payment of joint judgment by one defendant did not render moot an appeal from that judgment by the other defendant where the question of contribution as between the two defendants remained unresolved).

7. The issue of contribution among antitrust defendants is likely to recur and is of widespread public importance to the fair and equitable administration of antitrust class actions. This Court has held that review is not mooted

when the "underlying question persists" or is "capable of repetition." Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 179 (1968); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). In M.D.L. 310, the individual opt-out actions are pending and raise the identical contribution issue. Furthermore, another petition for certiorari, also from the United States Court of Appeals for the Fifth Circuit, is pending in Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (1980), on the issue of rights of contribution and claim reduction. This Court has also held that a tentative settlement agreement reached between the parties after certiorari is granted does not moot an appeal. Coopers & Lybrand v. Livesay, 437 U.S. 464, 465 n.3 (1978). In M.D.L. 310, the settlements of the class actions by petitioners have not received final judicial approval and may not, if at all, for some time to come.

For the foregoing reasons, Mead moves the Court for leave to intervene as a party petitioner in this matter. If Mead's motion is granted, Mead adopts the arguments set forth in its motion and brief as amicus curiae, as well as those set forth in petitioners' briefs on the merits.

Respectfully submitted,



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September 17, 1980

No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents,

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MEMORANDUM OF CERTAIN RESPONDENTS IN OPPOSITION TO THE MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

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No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents,

MEMORANDUM OF CERTAIN RESPONDENTS IN OPPOSITION TO THE MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

This Court granted the petition for a writ of certiorari of Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation") and Georgia-Pacific Corporation ("Georgia-Pacific") (collectively "petitioners"), defendants in the Corrugated Container Antitrust Litigation, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution in the circumstances of that litigation.

On September 17, 1980, The Mead Corporation ("Mead"), which had petitioned to proceed as amicus curiae before this Court, moved for leave to intervene as a party petitioner. The undersigned respondents oppose Mead's motion.

I

PROCEDURAL HISTORY

A. The Issue of Contribution

A brief recapitulation of certain prior proceedings and Mead's role therein is necessary to evaluate its present motion. On December 11, 1978 and March 1, 1979, Westvaco filed motions in the United States District Court for the Southern District of Texas for leave to assert cross-claims for contribution against settling defendants (J.A. 74, 128).* On May 9 and 10, 1979, Packaging Corporation and Georgia-Pacific filed similar motions (J.A. 223, 231).

On May 30, 1979, petitioners' motions for leave to assert the cross-claims were denied by the District Court, which entered final judgment pursuant to Rule 54(b), F.R.C.P. (J.A. 250). Petitioners appealed from that judgment in June 1979 (J.A. 272-74). The United States Court of Appeals for the Fifth Circuit, on October 30, 1979, affirmed the District Court's ruling disallowing claims of contribution (J.A. 277).

At the time the petitioners elected to raise the issue of contribution against settling defendants in the Southern District of Texas, Mead chose to assert its contribution claims in a different forum. Following the United States Court of Appeals for the Eighth Circuit's decision on contribution in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), Mead filed a separate complaint on May 21, 1979 in the United States District Court for the District of Minnesota, The Mead Corpora-

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* "J.A." refers to the Joint Appendix filed herein.

tion v. Alton Box Board Co., Civil No. 4-79-245, seeking contribution from all defendants in M.D.L. 310.* On June 5, 1979, the Judicial Panel on Multidistrict Litigation transferred Mead's complaint for contribution from the District of Minnesota to the Southern District of Texas for pretrial proceedings as part of M.D.L. 310.

Although on notice that the issue of contribution was to be decided by the Court of Appeals on petitioners' appeal, Mead did not seek to intervene as a party appellant in that forum. Rather, on September 14, 1979, with its separate action for contribution still pending in the District Court, Mead sought and was granted leave to file an amicus curiae brief out of time in support of the petitioners' position on appeal.

After the Court of Appeals rendered its decision, certain defendants moved to dismiss Mead's separate complaint for contribution on November 29, 1979. On December 21, 1979, the District Court entered an order dismissing Mead's claim for contribution with prejudice, citing its own prior opinion and the affirmance of that decision by the Court of Appeals. That order also dismissed with prejudice all other contribution claims and cross-claims still pending in M.D.L. 310. Mead did not appeal from that decision. Instead, on January 3, 1980, Mead filed a motion requesting that the District Court reconsider. No order has been entered on the motion for reconsideration.

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* The history of Mead's procedural moves in this litigation is reflected in the record below and, to some extent, in the motion of Mead to file an amicus brief filed with the Court on August 29, 1980.

With respect to the present petition for certiorari, Mead initially followed the same tactics it had employed in the Court of Appeals. On August 28, 1980, Mead filed a motion for permission to file an amicus curiae brief in support of petitioners' position before this Court. The motion was accompanied by Mead's proposed brief on the merits. On September 13, 1980, Mead moved for leave to present oral argument to this Court as amicus. In that motion, Mead stated that petitioners Georgia-Pacific and Packaging Corporation had yielded time to allow Mead to argue (Motion at p. 2).

Recent developments in the class action trial, however, caused Mead to abandon this approach. Two of the petitioners, Georgia-Pacific and Packaging Corporation, entered into settlement agreements prior to trial. The class action trial commenced on June 9, 1980 in Houston against three defendants -- Mead, Alton Box Board Company ("Alton") and the third petitioner Westvaco. On July 11, 1980, Alton entered into a settlement with the class. On September 3, 1980, Westvaco also settled its claims with plaintiffs, leaving Mead as the sole defendant on trial. On September 13, 1980, the jury returned a verdict against Mead, finding that Mead had participated in a conspiracy to fix prices of corrugated materials during the period from January 1, 1964 to December 31, 1975. The jury concluded that the class had been damaged by 5% during the damage period, March 7, 1973 to December 31, 1975. No final judgment has been entered as yet.

B. The Issue of Claim Reduction

At the same time the three petitioners moved in the District Court for leave to file contribution cross-claims, they also sought leave to amend their answers to assert claim reduction as an affirmative defense. Mead made a similar motion to amend its answer to assert claim reduction. These motions were denied by the District Court in the same order in which that court denied petitioners' motions with respect to contribution (Pretrial Order No. 13, May 30, 1979, J.A. 250). However, although the District Court entered an appealable final judgment on petitioners' contribution cross-claims, it specifically did not do so in denying their and Mead's motions for leave to assert the affirmative defense of claim reduction (compare ¶ 1 with ¶ 2 of Pretrial Order No. 13, J.A. 250). Mead did not appeal from that order.*

On the appeal by the three petitioners, the Court of Appeals, as noted, affirmed on the contribution issue. But it did not rule on the claim reduction issue:

> "We find that the second question dealing with claim reduction is not properly before us. Although the district court did enter an appropriate final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the cross-claims (right of contribution), it refused to do so as to the affirmative defense (claim reduction). Under these circumstances we have no jurisdiction to consider this issue" (J.A. 278).

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* In its motion to intervene, Mead does not refer to its separate motion to assert the claim reduction affirmative defense, or its denial by the District Court on May 30, 1979. Instead, Mead states that the claim reduction issue was raised in its separate complaint filed in the District Court in Minnesota (see Motion at ¶2). However, that complaint refers only to contribution and does not refer to claim reduction.

C. Respondents' Motion to Dismiss the Writ of Certiorari

On September 24, 1980 respondents (including plaintiffs and most defendants below) moved to dismiss the petition herein. The motion was based upon events that occurred after the granting of certiorari and that critically altered the character of the case as originally presented -- the three petitioners settled the lawsuit and no longer have any claim for contribution against settling defendants. The only remaining issue sought to be argued, that relating to claim reduction, is not properly before the Court in light of the jurisdictional history relating to that issue recited above.

II

ARGUMENT

Applications to intervene at the appellate level are granted "only in an exceptional case for imperative reasons." McKenna v. Pan American Petroleum Corp., 303 F.2d 778, 779 (5th Cir. 1962). Accord, In re Grand Jury Investigation, 587 F.2d 598 (3d Cir. 1978); Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 292 F.861 (2d Cir.), cert. denied, 263 U.S. 708 (1923). Applications to intervene at the Supreme Court level are even more rarely granted. See R. Stern & E. Gressman, Supreme Court Practice, §6.17, at 436 (5th ed. 1978).

Far from constituting "imperative reasons", the circumstances surrounding Mead's petition render it a particularly inappropriate candidate for this rarely granted privilege. The courts have repeatedly rejected applications for intervention at the appellate level where the applicant could have intervened at an earlier stage. United States v.

22,680 Acres of Land, 438 F.2d 75, 76 (5th Cir. 1971); McKenna v. Pan American Petroleum Corp., supra; Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89 (4th Cir.), cert. denied, 343 U.S. 963 (1952); Thomson-Houston Electric Co. v. Western Electric Co., 158 F. 813 (2d Cir. 1907).*

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* The six cases cited by Mead do not support its motion to intervene. In four of the six cases, the intervenors were not parties to the proceedings below and therefore lacked either a reason or an opportunity to intervene at an earlier stage. In Rogers v. Paul, 382 U.S. 198 (1965) the Court permitted the addition as parties plaintiff of two new members of the class on whose behalf the suit had been brought. Similarly, in Mullaney v. Anderson, 342 U.S. 415 (1952), the Court found that the union members added as parties plaintiff were the principals and real parties in interest to the suit; they were added when the defendants questioned the standing of the plaintiff union to bring the suit on its members' behalf. In Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968), the Court permitted intervention by a real party in interest upon a showing that the party who had represented movant's interests below did not intend to seek certiorari. See R. Stern & E. Gressman, Supreme Court Practice, supra, § 2.4 at 59. And in Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944), intervention was permitted where the intervenor had not appeared before the reviewing court below only because of lack of notice of the proceedings. Unlike the intervenors in Eastern-Central Motor Carriers Association, Mead was on notice of the appeal to the Court of Appeals raising issues similar to its separate complaint for contribution, and Mead could have petitioned for intervention at that stage. Unlike the intervenors in Rogers and Mullaney, Mead was not a member of a class or group represented by petitioners below. Unlike Chicago Grain Trimmers, petitioners in this case have not purported to represent Mead's interests at any stage of this litigation.

The other two cases cited by Mead are inapposite. The Court permitted intervention in United States v. St. Louis Terminal, 236 U.S. 194 (1915), for the limited purpose of ensuring that details of an antitrust compliance decree did not unnecessarily harm movants, who were innocent third parties. In NLRB v. Acme Industrial Co., 384 U.S. 925 (1966), the Court permitted a union to intervene pursuant to its decision in UAW v. Scofield, 382 U.S. 205 (1965), interpreting the National Labor Relations Act to allow intervention in appeals of NLRB orders by the party which had prevailed below.

Here, Mead was on notice that the issue of contribution was being litigated in the Court of Appeals and in this Court. Rather than moving for intervention, Mead chose to participate as amicus curiae in the Court of Appeals and, initially, in this Court. Those decisions may well have been motivated by tactical considerations. In the event that petitioners were successful in either court, Mead would assert that such a favorable decision controlled its status. In the event that petitioners were to fail, Mead would doubtless assert that it was not bound by such an adverse decision. However, with the settlement by Westvaco, Mead has lost its stalking horse. Faced with the recent jury verdict against it, Mead has moved to intervene to propound the right of contribution for itself. The failure of Mead's tactics does not constitute the kind of compelling justification for intervention at the appellate level that the courts have uniformly required.

Mead's petition to intervene is an attempt to circumvent the usual appellate process. After its complaint for contribution was dismissed in December 1979, Mead chose to make a motion for reconsideration rather than appealing that order. Having elected to forego an appeal, Mead cannot cure the jurisdictional and procedural defects of Georgia-Pacific and Packaging Corporation (set out in respondents' motion to dismiss the writ of certiorari) by trying in effect to invoke this Court's original jurisdiction. See Morin v. City of Stuart, 112 F.2d 585 (5th Cir. 1939).

Mead contends that because the contribution issue is "likely to recur" it is not moot. Motion at ¶2. As we pointed out in our motion to dismiss the writ of certiorari,

an issue must not only be "capable of repetition" but also "evade review." Roe v. Wade, 410 U.S. 113, 125 (1973). Mead is unable to point to anything about the way contribution arises in antitrust litigation which renders it evasive of review and the pendency of Texas Industries, Inc. v. Radcliffe Materials, Inc., 48 U.S.L.W. 3570 (No. 79-1144) (cert. pending) indicates that the issue is not one which routinely becomes moot.*

Finally, to the extent that Mead attempts to intervene to inject claim reduction as one of the issues to be considered upon this writ of certiorari, as it did in its amicus curiae brief, Mead's motion must be denied since that issue is not before this Court. As set forth above, the petitioners raised the claim reduction issue when they sought leave to

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* Mead further suggests that the various cross-claims for contribution asserted in the opt-out cases supply the missing "case or controversy." Motion at ¶4. The petitioners, however, failed to make any kind of record in the Court of Appeals concerning the opt-out cases, which were not a factor in the decisions below.

As noted in the respondents' motion to dismiss the writ of certiorari, petitioners argued for contribution and claim reduction in the context of a series of settlements by co-defendants in the class action which left the defendants with the choice of meeting the class' settlement demands or risking a verdict based on the liability of all defendants, including those who had settled. There have been no such settlements in the opt-out cases. Petitioners' belated attention to the opt-out cases at this time cannot change the record on the writ of certiorari, which is virtually bereft of references to non-class action cases. The opt-out cases are not more than "incidental" features of this appeal, which is moot "as respects its main features." Alejandrino v. Quezon, 271 U.S. 528, 535 (1926).

Moreover, it should be noted that contribution cross-claims in opt-out cases were dismissed by order dated December 21, 1979, after the Court of Appeals had affirmed the District Court on the issue, and no appeal has been taken from that December order.

amend their answers to assert claim reduction as an affirmative defense (J.A. 135, 231 and 241). On May 25, 1979, Mead also filed in the District Court a motion to amend its answers to assert claim reduction. Mead's motion was denied by the District Court at the same time that it denied the similar motions by petitioners (J.A. 250). The District Court did not enter an appealable final judgment on that issue (J.A. 250), and the Court of Appeals held that the "question dealing with claim reduction is not properly before us . . . . Under these circumstances we have no jurisdiction to consider this issue" (J.A. 278). Thus, according to the Court of Appeals ruling, the issue of claim reduction is not before the Court at this time. Mead will have the opportunity to present the issue of claim reduction in ripe form for decision upon any appeal from a final judgment against it awarding damages.

CONCLUSION

For the foregoing reasons, Mead's motion for leave to intervene as a party petitioner in this matter should be denied.

Dated: September 26, 1980

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No. 79-972

In the Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
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Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether defendants in antitrust cases may assert rights of contribution.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

The parties to the proceedings in the courts below are listed in Appendix A to the Petition for a Writ of Certiorari, which Appendix is incorporated herein by this reference.

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Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Columbia L. Rev. 1 (1971) 14

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The Opinion of the United States Court of Appeals for the Fifth Circuit is not reported and is reproduced in the Joint Appendix ("J.A.") at 277. The Opinion of the United States District Court for the Southern District of Texas is reported at 84 F.R.D. 40 and is reproduced in the Joint Appendix at 259.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 30, 1979. The petition for a writ of certiorari was filed on December 21, 1979, and was granted on June 16, 1980. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Georgia-Pacific Corporation ("Georgia-Pacific") adopts the "Statement of the Case" contained in the Brief for Petitioner Westvaco Corporation ("Westvaco Br."), supplemented as follows:

On April 2, 1980, approximately three months after the petition *sub judice* was filed in this Court, Georgia-Pacific entered into a settlement agreement with the class action plaintiffs who have filed complaints in this multidistrict antitrust litigation ("M.D.L. 310").[1] In that agreement, Georgia-Pacific and two other defendants (Potlatch Corporation and Fibreboard Corporation) agreed, *inter alia*, to

[1]On May 6, 1980, the district court preliminarily approved the Georgia-Pacific settlement so that notice of the settlement and of a hearing to consider its final approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure could be given to the class. Pretrial Order No. 50. In light of the ongoing class action trial and the need for notice to the class, however, it appears unlikely that final approval of this settlement will be considered by the district court before late 1980. Georgia-Pacific's settlement thus remains tentative at this time. Copies of Georgia-Pacific's settlement agreement, Pretrial Order No. 50, and the materials cited in footnotes 8, 13, 16, 20 and 23 of this Brief are being provided to the Clerk of this Court.

pay a total of $3 million in order to settle the claims of the plaintiff class against them,[2] thereby avoiding the impending class action trial scheduled to begin only a few weeks after the settlement agreement was executed.[3]

Georgia-Pacific then believed and still believes that the allegations of antitrust violations made against it in this litigation are unfounded. Almost three years of intense discovery in this civil litigation, following an eighteen-month-long grand jury investigation, has confirmed that belief and demonstrates why Georgia-Pacific was neither indicted nor named as an alleged unindicted coconspirator as a result of the grand jury investigation.[4] Nevertheless, such a settlement presented an opportunity for Georgia-Pacific to avoid the tremendous and ever-increasing costs of defense of the massive class action cases, including a several-month trial, and to protect itself against the potentially devastating, albeit extremely remote, risk of an adverse judgment in the class action trial.[5]

[2]Although the amount Georgia-Pacific agreed to pay is much less than that paid by many other defendants in M.D.L. 310 (*see* Westvaco Br., App. B), such an amount is still exorbitant where the payment is made for claims that are believed to be unfounded.

[3]The class action trial, originally scheduled to begin on May 19, 1980, commenced in early June 1980 against three defendants, Alton Box Board Company, The Mead Corporation and petitioner Westvaco. Alton entered into a settlement agreement with the plaintiffs during the trial, but the trial against the remaining two defendants is still in progress at the date of filing of this Brief.

[4]Fibreboard and Potlatch, the other two defendants who were parties to Georgia-Pacific's settlement agreement, also were not indicted by the Houston grand jury or named as alleged unindicted coconspirators.

[5]Long before Georgia-Pacific's tentative settlement with the class action plaintiffs, Georgia-Pacific, Westvaco and Packaging Corporation of America had sought leave of court to amend their answers in those cases to assert contribution rights by cross-claim and affirmative defense and those efforts to assert contribution rights had been denied by the courts below. *See* Westvaco Br. at 7-8.

Georgia-Pacific also has been named as a defendant in some of the separate cases filed by plaintiffs who have opted out of the M.D.L. 310 plaintiff class. Georgia-Pacific and other defendants have either filed or sought leave to file contribution claims and defenses in these opt-out cases.[6] Discovery is now ongoing in these cases, which have been consolidated for pretrial proceedings as part of M.D.L. 310.

SUMMARY OF ARGUMENT

This Court should adopt appropriate contribution rules for civil antitrust cases in order to promote justice and fairness. The rule of law denying contribution rights has been recognized as outmoded in nearly every other field of law, and there is no sound reason for rejecting this rule of fundamental fairness in antitrust cases. There is an obvious and compelling need to eliminate the opportunity for the kind of settlement abuse that became a reality in M.D.L. 310 and other kinds of abuse that can occur in the absence of contribution rules.

The recognition of contribution rights in antitrust cases would eliminate such abuses and would foster a just system for the civil enforcement of the antitrust laws consistent with the underlying objectives of those laws and with every defendant's right to a fair and realistic opportunity to litigate or settle claims against it on the merits of those claims. This Court and other courts have sought to avoid unwarranted overdeterrence from an unduly strict imposition of sanctions for violation of the antitrust laws. In treble damage class actions, the staggering damage exposure that can result from a denial of contribution rights coupled with joint and several liability creates an unjustifiable measure of deterrence without furthering the legitimate objectives of the antitrust laws.

[6] At the time the district court denied Georgia-Pacific's motion for leave to amend its answers to assert contribution cross-claims and defenses, Georgia-Pacific had filed its separate answers to several opt-out cases then pending as part of M.D.L. 310. Since that time, Georgia-Pacific has included such cross-claims and defenses in its answers filed in additional opt-out cases.

Denial of contribution rights creates underdeterrence of the most culpable antitrust violators, who can obtain sweetheart settlements or avoid suit altogether, while forcing the less culpable, as well as those defendants wrongly accused, to bear a disproportionate and inequitable share of damages. Rights of contribution achieve fair and properly balanced deterrence in the private enforcement of the antitrust laws.

The Court should not adopt a rule of contribution among defendants that would be unfair to settling defendants. In the context of partial settlements of antitrust cases, this Court should harmonize contribution and compromise of litigation by claim reduction. In horizontal price-fixing cases such as M.D.L. 310, the plaintiffs' claims should be reduced by a proportionate amount based upon the sales of the products involved by settling defendants. This rule will not discourage fair settlements; rather, it will result in settlements that are related to the merits of the alleged claims as against each defendant.

ARGUMENT

Petitioner Westvaco sets forth in its brief numerous, compelling reasons for application of contribution principles in antitrust cases. Georgia-Pacific endorses those arguments, which are premised upon the inherent fairness of contribution rules and the beneficial effects that proper application of such rules can have in antitrust litigation. Although Georgia-Pacific's posture in the class action part of this litigation has changed since the filing of the petition for a writ of certiorari because of its tentative settlement agreement with the class action plaintiffs, Georgia-Pacific still emphatically supports the proper application of principles of contribution in antitrust cases as sought in the petition because of the inherent unfairness and coercive nature of the no-contribution, no-claim-reduction rule.

I. The Absence of Contribution and Claim Reduction in This Litigation Created Grossly Inequitable Settlement Coercion on Defendants

The settlement history in M.D.L. 310, both generally and with respect to Georgia-Pacific, starkly illustrates the extreme settlement abuse that plagued this litigation because of the absence of contribution and claim reduction in this case.

In fact, M.D.L. 310 repeats again the pattern in antitrust class actions that has become all too familiar over the last decade. First, prior to the completion of a widely publicized grand jury investigation of an industry, class actions are brought premised on the existence of the investigation against every substantial member of the industry.[7] Then, the grand jury returns indictments of only a few members of the industry.[8] As the civil actions continue against all defendants, the certification of a large class results in each defendant being faced with potential liability of billions of dollars.[9] Consequently, quick but inequitable settlements having little or nothing to do with the merits are forced upon many of the defendants because plaintiffs, by divide and conquer

[7] The Houston grand jury investigation of the corrugated industry became widely known more than a year before any indictments were returned. *See, e.g.*, Wall Street Journal, Oct. 26, 1976, at 28 (S.W. ed.). In such cases, members of the plaintiffs' bar, drawn by the prospect of quick settlements and lucrative attorneys' fees, engage in a rush to the courthouse in order to achieve a foothold on a desired forum for multidistrict litigation purposes and a leadership position among plaintiffs' counsel. *See, e.g.*, Rudnitsky & Blyskal, *Getting Into Those Deep Pockets*, Forbes, Aug. 4, 1980, at 59-62.

[8] Georgia-Pacific and three other M.D.L. 310 defendants were not even referred to in the part of the Government's bill of particulars that listed over 600 alleged coconspirators identified as a result of the exhaustive, eighteen-month Houston grand jury investigation. In fact, Georgia-Pacific was identified as one of the accounts alleged to have suffered damages. Letter from Justice Department counsel in criminal cases (July 21, 1978).

[9] In M.D.L. 310, plaintiffs' estimates of the damages claimed ranged up to almost $6 billion. (J.A. 236.)

"game theory" tactics, exploit a no-contribution, no-claim-reduction rule. (J.A. 142 *et seq.*)

The reason for the settlement "stampede" that occurred early on in this litigation, described in petitioner Westvaco's brief (Westvaco Br. at 4-7, 31-34), is most dramatically reflected by the trial judge's own observation, after personally supervising those settlement proceedings, that it was "undisputable" that the enormous damage exposure resulting from the absence of contribution "is inherently coercive," so that "[e]ven a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial." (J.A. 260.) This statement echoed similar concerns expressed by this and other courts about the coercive effects of the staggering damage exposure in antitrust and other large class action cases resulting in strong disincentive for defendants to contest antitrust claims against them.[10]

[10]*See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Reiter v. Sonotone Corp., 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (potential treble damage award of $750 million against a single defendant because of alleged joint and several liability in antitrust class action viewed as an "outrageous" amount that "would shock the conscience"); Hooley v. Red Carpet Corp. of America, 1975-1 Trade Cas. ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) (enormous risk of class-wide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not."). These same considerations that have led courts to question the propriety of class certification where it creates an enormous risk of damage exposure, carrying "to an absurd and stultifying extreme" the private enforcement remedies prescribed by Congress (Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972)), are equally applicable to the no-contribution rule. That rule likewise seeks not merely to impose punishment for a wrongdoer's "own malefactions . . . [but] to subject him to vicarious liability . . . for the staggering damages of the multitude . . . . At some point the logic of the law leads . . . to an ad absurdum result." Kline v. Coldwell, Banker & Co., 508 F.2d at 235.

Georgia-Pacific's posture in this litigation, and its decision to settle the class litigation when it did, further illustrate the inordinately unfair consequences of a denial of contribution rights in antitrust cases. Georgia-Pacific's settlement, as the settlements of other defendants, could not have been achieved by the plaintiffs were it not for the coercive effect of the no-contribution, no-claim-reduction rule that confronted each defendant with the Hobson's choice of risking potential multi-billion-dollar, industry-wide damages or capitulating to extortionate settlement demands.

As a result of the eighteen-month-long Houston grand jury investigation, the publicity of which spawned this treble damage litigation while the grand jury was still sitting, Georgia-Pacific, as well as 22 of the 36 other defendants named in these private, civil actions, was not indicted by the grand jury.[11] Furthermore, when the Government responded to the indicted defendants' request for a bill of particulars, Georgia-Pacific, along with only three other civil defendants, was not even named as an alleged unindicted coconspirator. Thus, the grand jury and the Government prosecutors who ran the investigation presumably did not believe that Georgia-Pacific was a participant in the alleged conspiracy. Indeed, Georgia-Pacific was identified by the Government as one of the specific accounts that had been targets of the alleged conspiracy.

Nevertheless, notwithstanding that the grand jury had not implicated Georgia-Pacific in any way, the settlement terms offered to this defendant in the time period of the

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[11]Georgia-Pacific, along with most of the civil defendants, had produced vast quantities of documents to the Government in response to subpoenas issued as part of the Houston grand jury investigation. The first M.D.L. 310 treble damage class actions were filed in March 1977, fully ten months before the results of the grand jury investigation were to become known.

settlement stampede and for a long period thereafter were, on a take-it-or-leave-it basis, the same escalating demands available to all unindicted defendants. For settlement negotiation purposes, the plaintiffs grouped the defendants into three classifications—felony-indicted defendants, misdemeanor-indicted defendants and unindicted defendants—and they refused to deviate from their increasing, multi-million-dollar "per point" demands established for members of each group. Consequently, unless it wished to capitulate to these extortionate demands, Georgia-Pacific, believing in and anxious to demonstrate its innocence, could only stand by and watch the potential multi-billion-dollar damage exposure confronting it escalate with each successive settlement.[12] Moreover, avoidance of the inordinate burdens of defending this massive litigation at that stage other than by settlement was not possible, even for a defendant in Georgia-Pacific's position, as illustrated by the district

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[12]Treble damage plaintiffs are induced to offer several early, discounted settlements to those defendants they believe to be most culpable in order to capitalize on the "ice-breaking" effect of such settlements on other defendants who are, solely by reason of such settlements, faced with a substantially increased damage exposure. The logical tendency of defendants who recognize their culpability to seek early settlement in order to avoid adding substantial litigation costs to the readily perceived future burden of having to respond in damages supports the observation that "the early-settling defendants may well be those whose liability is clearest." Manual for Complex Litigation §1.46, at 63 (1977). Moreover, the most culpable antitrust violators are induced by a no-contribution rule to seek early sweetheart settlements that will be relatively inexpensive and will enable them to retain a substantial portion of the benefits of their unlawful conduct, while leaving less culpable or wrongly accused defendants to bear the burdens of potential liability for all defendants' conduct. The no-contribution, no-claim-reduction rule enables plaintiffs to obtain settlements with the most culpable defendants, while their total damage claim against nonsettling defendants remains virtually unaffected. (J.A. 38, 152-53, 161-62, 179-80.) These undisputed consequences of a denial of contribution rights wholly distort the deterrent function of treble damage litigation. *See* pp. 19-21 *infra*.

court's curt denial of the motion for dismissal of the case against it filed by Crown Zellerbach Corporation, one of the other three M.D.L. 310 defendants that had not been indicted or alleged to be a coconspirator in the companion criminal cases.[13]

That the class action plaintiffs' settlement demands increased as a direct consequence of the effect of the no-contribution, no-claim-reduction rule is indisputable.[14] Though couched in terms of "enhancement," the only means by which the plaintiffs were able almost daily to raise, in million-dollar increments, the amounts they were demanding and receiving in settlement was the threat to defendants of a monumental judgment that increased with each succes-

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[13]That motion, requesting a dismissal without prejudice, was premised upon the undisputed ground that Crown Zellerbach had been named as a defendant solely because it was a substantial member of the industry being investigated by the grand jury and because plaintiffs presumably were aware that it had received a subpoena *duces tecum* in the grand jury investigation. The district court ruled that, even in such circumstances, such a defendant could be forced to remain in the case while the plaintiffs searched for evidence of their then unsupported claim:

> [CROWN ZELLERBACH COUNSEL]: ... How have [plaintiffs] shown that they have satisfied the very basic obligations of a litigant before you come into court. You [must] have some reasonable grounds for alleging wrongdoing.
>
> THE COURT: I don't know that there is any basis for that.... Every day we deal with people that just come in and file a lawsuit and then decide they don't have any grounds for it, and my answer has been and always, I think, probably will be, well, that's just well and good, but let's engage in the discovery process and then if they can't find any facts, [the defendant can move to dismiss].

Transcript of Proceedings, In Chambers Conference, Feb. 2, 1979, at 56-57.

[14]As early as December 1978, after only two defendants had settled and only days before the settlement stampede began, the district court rejected conditioning approval of the two settlements before it upon claim reduction. (J.A. 112-17.)

sive settlement.[15] The lack of contribution rights did not result in negotiation of settlements based upon a reasoned evaluation of the risks and merits of each party's case; rather, settlement amounts were related to the timing of other settlements and to the plaintiffs' ability to capitalize on a "game theory" that, though proved to be mathematically sound, bears none of the hallmarks of the justice that our courts are to dispense.[16]

[15]During December 1978 and January 1979, the time of the vast majority of the settlements, there was no significant change in circumstances, other than the impact of the lack of contribution rights on the damage exposure facing remaining defendants brought about with each settlement, that can explain the plaintiffs' ability to demand and obtain ever-increasing settlement amounts. Moreover, these settlements occurred before a single deposition had taken place in the litigation. Indeed, the only other significant event during that time period was the district court's division of the plaintiff class into two subclasses, but that occurrence further demonstrates the striking *in terrorem* effect of the absence of contribution rights, as defendants continued to pay higher and higher amounts even though their settlements, unlike earlier ones, did not settle claims of the entire plaintiff class. (J.A. 166-69.)

[16]In *In re Folding Carton Antitrust Litigation*, M.D.L. No. 250 (N.D. Ill.), the class action plaintiffs went so far as to retain an expert mathematician to support settlements in that litigation by expounding upon the virtues of their "game theory" of seriatim settlement negotiation to capitalize on the inherent harshness of the no-contribution rule to antitrust defendants. As this expert observed:

> [P]ursuit of such a strategy, absent special considerations such as ability to pay, will lead to an increasing series of relative settlements by each of the defendants. This is primarily due to the fact that as more individual settlements are made the maximum potential damages payable by each of the remaining non-settling defendants increases.

Affidavit of Martin Shubik, Dec. 4, 1978, at 2-3. Simply put, settlements are extracted not on the basis of the merits or lack of merits of the case against a particular defendant but rather as a direct consequence of the coercive effect of a rule of law that does not allow equitable apportionment of damages. Not coincidentally, Georgia-Pacific, one of the last defendants to settle in *Folding Cartons*, was compelled to pay a half-million dollars in settlement in that litigation even though, in the plaintiffs' own words, this company was "notable for its absence from any conspiratorial involvement . . . ." In re Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D.Ill.), Memorandum of Class Plaintiffs in Support of the Proposed Settlements and Proposed Plan of Distribution, July 9, 1979, at 64.

Only after the M.D.L. 310 class action cases had proceeded almost to the eve of trial, after more than a year of further extensive and costly pretrial proceedings including the Court of Appeals' denial of petitioners' efforts to assert contribution rights in this litigation, was a settlement offered to Georgia-Pacific that was reluctantly deemed acceptable, though extremely costly, in light of the risk of having to share with a handful of other companies the immense consequences of an unlikely, yet nonetheless possible, adverse judgment based upon the alleged wrongdoing of an entire industry.[17] The extraction of such multi-million-dollar settlements from such defendants, believing in their innocence but forced to forego a trial on the merits because of these unwarranted risks, is demonstrably unfair and unjust.

II. Contribution Rules Are Particularly Appropriate for Antitrust Cases

The archaic approach prohibiting contribution has been repudiated in nearly every other area of the law,[18] and there is no sound reason for precluding adoption of such rules of fundamental fairness in antitrust cases. Indeed, the legitimate objectives of the antitrust laws are better served by allowing contribution, which results in antitrust defendants' facing damage exposure for the consequences of their own acts. Because of the possibility of overdeterrence and the substantial disincentives defendants face in litigating massive antitrust class actions on the merits, this Court should be extremely sensitive to the impairment of basic rights brought about by denial of contribution rules of fairness in antitrust litigation.

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[17]Georgia-Pacific first entered the corrugated container industry in the early 1960's and its sales of corrugated products today amount to less than three percent of industry sales, with a substantial portion of the M.D.L. 310 defendants having larger market shares than Georgia-Pacific. *See* Westvaco Br., App. B.

[18]*See* Westvaco Br. at 15-20.

In *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc rehearing denied*, 608 F.2d 524 (1979), *petition for cert. filed sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144, 48 U.S.L.W. 3570 (Jan. 24, 1980), the Court of Appeals for the Fifth Circuit based its denial of contribution rights in part on its perception of the "chilling effect" of the "threatening specter of sole liability" that will cause businesses "necessarily [to] steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression." *Id.* at 905. To premise a no-contribution rule upon such reasoning, however, not only reflects a serious misconception of the antitrust laws but also conflicts with principles of antitrust enforcement enunciated by this Court.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court cautioned against overdeterrence from a too-strict imposition of criminal sanctions for conduct that violates the antitrust laws:

> [T]he behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. *The imposition of* criminal *liability* on a corporate official, or for that matter on a corporation directly, *for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects,* without inquiring into the intent with which it was undertaken, *holds out the distinct possibility of overdeterrence;* salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

Id. at 440-41 (emphasis supplied) (footnote omitted).[19] These same concerns apply to treble damage civil litigation; indeed, potential treble damage exposure, when magnified even further by a denial of contribution rights, often dwarfs the sanctions that can be imposed for criminal antitrust violations and can result in equally improper overdeterrence. As the Court of Appeals for the Third Circuit recently warned, "the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws.... [C]ourts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect on competition." *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979) (footnotes omitted).

As the supposed easy answer to the proponents of contribution rules in antitrust cases, it is often said that antitrust violators are intentional wrongdoers who need not be accorded fair treatment. *See, e.g., Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 900 & n.5, 905 (5th Cir. 1979); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, at 79,701 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). Numerous factors, however, including the concerns expressed by this Court in *Gypsum*, demonstrate that antitrust defendants are in fact entitled to fair treatment and

[19] As the Court noted:

> [W]here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose.

438 U.S. at 442 n.17.

should not blithely be prejudged and condemned, as opponents of contribution rules would do, as villainous perpetrators of "heinous" crimes against society who are undeserving of rules of fairness.[20]

Significantly, a denial of contribution rights reaches beyond those who may have violated the antitrust laws and dramatically affects the rights of defendants named in treble damage litigation who are innocent of the alleged violation or who are, at most, marginally culpable.[21] Such defendants, who may have been sued without any legitimate basis and nonetheless face the burdens of defending complex, protracted and exceedingly expensive litigation, are placed by a no-contribution, no-claim-reduction rule in the position of having to pay enormous amounts, unrelated to their conduct, to settle or risking the possibility, however slight it might be, of being subjected to a decimating judgment.[22]

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[20]In the Court of Appeals, the plaintiffs thus offered numerous epithets to describe the alleged conduct of defendants in this case. *See, e.g.*, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir.), Brief for Plaintiffs-Appellees at 20 ("[a] scheme to bilk corrugated container consumers of billions of dollars"); at 22 (contribution would "give relief to the conspirators who deliberately engaged in price-fixing schemes to injure the nation's free-market economy"); at 26 (claim reduction is not fair "to the innocent victims of defendants' heinous acts").

[21]Particularly in antitrust conspiracy cases, the possibility of liability for very minimal involvement in the alleged wrongful conduct exists and proof in such cases is often largely circumstantial and based on inference. *See, e.g.*, United States v. Consolidated Packaging Corp., 575 F.2d 117, 126-27 (7th Cir. 1978).

[22]Clearly "false [is] the notion that every antitrust defendant, without exception, is guilty as charged in a private complaint." Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Columbia L. Rev. 1, 9 (1971). The notion that all antitrust defendants are guilty is incompatible with the right of all litigants to a reasonable opportunity for fair adjudication of claims asserted against them. Surely our system cannot accept the plaintiffs' presumption that everyone sued by them is a violator of the law; yet the *Abraham* court seems to have premised its "overkill deterrence" rationale on such a presumption.

Deference to the deterrence objectives of the federal antitrust laws already has led to stated judicial reluctance to permit any impediment to possibly meritorious private antitrust claims by the granting of summary pretrial rulings.[23] As a result, naming defendants in a blunderbuss fashion is now commonplace so that the marginally culpable and innocent are forced to defend such cases.[24] As dramatically illustrated by the settlement history of M.D.L. 310, a denial of contribution and claim-reduction rights has tipped the balance of litigation advantage so far to the side of treble damage plaintiffs and so far against such defendants that, although settlements are the inevitable result, such compromises legitimately cannot be described as fair or desirable. As this

[23]Summary pretrial adjudications in antitrust cases are strongly disfavored. *E.g.*, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); *see* pp.8-9 & n.13 *supra*. This principle graphically illustrates the practical burdens that are placed upon a company simply because it has been named as a defendant in treble damage litigation, even if the charges against it are totally baseless. For example, in *Folding Cartons, Inc. v. American Can Co.*, No. 76 C 1113 (N.D. Ill.), a magistrate, after hearing, found that a group of defendants, including Georgia-Pacific, had been joined almost two years after the original complaint was filed simply as a tactical ploy to seek to overcome an objection to the adequacy of the plaintiff's class representation because it had not initially sued all of its suppliers of the product in question. The magistrate found it undisputed that "neither plaintiff nor his attorney could have held an honest belief that there were good grounds to support antitrust claims against these six defendants." Memorandum in Support of Report and Recommendation on Certain Defendants' Motions to Dismiss, July 27, 1979, at 13-16; *see* Fed. R. Civ. P. 11. Nevertheless, the district court in that case rejected the magistrate's recommendation to dismiss the complaint without prejudice. The court concluded that even that limited relief was not appropriate because the complaint was "neither demonstrably false nor preposterous on [its] face." Slip Op., June 16, 1980, at 2. Even though there was "virtually nothing to suggest that any kind of review of the pricing practices of these specific defendants was pursued before they were embroiled in the litigation" (*id.* at 4), the court left the defendants only the hollow hope of seeking sanctions if the plaintiff's allegations later proved to be without substance.

[24]Long before any indictments were returned by the grand jury, many M.D.L. 310 plaintiffs thus named as defendants major companies in the industry that had received grand jury subpoenas. *See* Westvaco Br. at 3-4.

Court observed in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975): "[A] rule of fairness in court will produce fair out-of-court settlements."[25] The unfairness of the absence of contribution rights, on the other hand, quite clearly causes the kind of settlements that should not be fostered.[26]

In addition to the wrongly accused, even those defendants who may have violated the antitrust laws may not properly be classified as a group of litigants who do not deserve judicial rules of fairness.[27] Undeniably, antitrust violations can strike substantial blows to our economic system, and certain antitrust violations, carried out with the requisite state of mind, can subject the violators to serious criminal penalties. 15 U.S.C. §§1, 2; *see United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978). Nevertheless, it is widely recognized that antitrust law is one of the most complex, changeable and uncertain areas of substantive law in American jurisprudence. As this Court has stated: "The Sherman Act. . . does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the

[25]Promoting a denial of contribution rights as a means to induce compromise of litigation ignores the principles of fairness and justice that undergird such rights,

> [f]or, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

[26]M.D.L. 310 provides but one example of the kinds of litigation abuse engendered by a denial of contribution rights. A no-contribution, no-claim-reduction rule just as clearly can legitimatize selective private enforcement of the antitrust laws based upon the treble damage plaintiff's whim or collusion with others. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979), *en banc rehearing denied* (Apr. 17, 1979).

[27]This Court has always recognized the need for rules of fairness even for those accused of the most heinous crimes.

clear and definitive rules of conduct which the statute omits . . . ." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978). *See also Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936).

The relative costs and benefits to our economy resulting from conduct that may run afoul of the antitrust laws are frequently difficult to discern and often are hotly debated.[28] Moreover, the amount and impact of damages that may flow from anticompetitive conduct, particularly allegedly supra-competitive prices, are especially difficult to ascertain.[29] Even in cases of so-called "price-fixing," which has long been held to be *per se* unlawful, the borderline between what is and what is not unlawful under this *per se* rule often is extremely obscure.[30] Accordingly, as this Court recognized in *Gypsum*, the inherent uncertainty of the standards of illegality and the consequences flowing from conduct proscribed under the antitrust laws does not permit easy categorization of such conduct as right or wrong.

In fact, the historical genesis of this litigation provides an example of such uncertainties and demonstrates the obscurity of the line of demarcation between right and wrong under the antitrust laws, even in horizontal price-fixing cases. Thus, the kind of conduct that has formed the core of plaintiffs' claims in M.D.L. 310 is the alleged exchange of price information among competitors. (J.A. 21, 172-73.) Such conduct is not unlawful *per se* as it "does not invariably have anticompetitive effects." *United States v. United States*

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[28]*See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61, 375-77 (1933).

[29]*See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 731-33, 736-45, *rehearing denied*, 434 U.S. 881 (1977); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-66 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931).

[30]*See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-9, 13 & n.24 (1979), *on remand*, 1980-2 Trade Cas. ¶ 63,289 (2d Cir. 1980).

Gypsum Co., 438 U.S. 422, 441 & n.16 (1978). Under a 1940 consent decree entered into by many members of the corrugated container industry long before Georgia-Pacific entered that industry, certain forms of communication of price information between competitors, including exchanges of past and certain current price information, were permitted and hence presumably were believed to be acceptable under the antitrust laws. *United States v. National Container Ass'n*, 1940-1943 Trade Cas. ¶ 56,028, at 85-86 (S.D.N.Y. 1940); *see United States v. Container Corp. of America*, 273 F. Supp. 18, 28-30 (M.D.N.C. 1967). Then, in proceedings leading up to this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), the Government first empaneled a grand jury to investigate these practices and then filed a civil injunction suit alleging an unlawful "price fixing" agreement based upon, *inter alia*, such exchanges of price information in this industry. That proceeding resulted in a district court determination that the conduct in question was not unlawful; in the *Container* decision, however, this Court concluded, *with three Justices dissenting*, that such conduct violated section 1 of the Sherman Act. In M.D.L. 310, the plaintiffs, embracing the findings and rulings of this Court in *Container* and seeking damages for sales by defendants as far back as the early 1960's, have sought in part to impose treble damage liability on defendants for conduct of more than a decade ago even though that conduct first was believed possibly to be unlawful only after a landmark decision of this Court years after the conduct took place.[31]

In sum, it is no answer to the problem of unfair treatment resulting from a denial of contribution rights to say that the class of persons to be protected, that is, antitrust defendants, are such "wrongdoers" that they simply do not

[31]Significantly, the M.D.L. 310 defendants who stood trial in the companion criminal cases were acquitted by a jury after only three hours of deliberation following a three-month trial.

deserve fair treatment. To the contrary, their fair treatment by adoption of contribution rules not only is appropriate because of the nature of the antitrust laws but also because those rules of fairness will foster proper deterrence of antitrust violations.[32]

Significantly, contribution will result in punishment of the most culpable antitrust violators. The motivations for selective private enforcement of the antitrust laws have been exhibited in other recent antitrust cases in which contribution rights were asserted. *E.g.*, *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979)(recognizing potential, as alleged in that case, for large or powerful violator to exert economic influence to

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[32]Private antitrust remedies, like private enforcement tools in the securities laws, are designed to serve essentially the same goals of deterrence and providing an incentive to institute private enforcement actions. Contribution has been found to serve such purposes well under the securities laws, even for "intentional" violations. *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979); Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). A report of the Section of Antitrust Law of the American Bar Association recently observed:

> [M]any antitrust suits do not involve "intentional" behavior in the usual sense of that word. . . . The case law is replete with examples of good faith efforts to comply with the antitrust laws that were later held unlawful. [*citing United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Simpson v. Union Oil Company*, 377 U.S. 13 (1964).] Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. Whatever the wisdom of making an employer strictly liable for civil injuries in such circumstances, under no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

American Bar Ass'n, Section of Antitrust Law, ***Resolution and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder***, Aug. 17, 1979, at 6-7.

keep plaintiff from seeking damages from it); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, at 79,706 (10th Cir. 1979)(Holloway, Cir. J., concurring and dissenting) (recognizing the "potential of a plaintiff deliberately choosing to sue a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties"). Without contribution rules to apportion liability, moreover, the most culpable wrongdoers are not properly deterred because, even if sued, they can seek early sweetheart settlements, enabling them to retain much of the fruits of their unlawful conduct while shifting the burden of damage liability for their conduct onto the less culpable or innocent defendants. Treble damage plaintiffs are encouraged to capitalize on the bargain nature of such defendants' settlements while retaining virtually the entirety of their claims to press against remaining defendants, aided by the inherently coercive nature of the increases in damage exposure resulting from the early settlements.

Thus, a no-contribution, no-claim-reduction rule, which has been exhorted largely as a rule designed to promote deterrence of wrongdoing (*e.g., Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901, 905-06 (5th Cir. 1979)), in fact turns the deterrence objective of the antitrust laws on its head. Under such a rule, the most culpable violators, because of factors wholly extraneous from considerations of who is most deeply at fault, can get off "scot free" or, at most, having to disgorge only a small part of their gains from their unlawful conduct. The largest exaction of damages, by trial or settlement, is left for the less culpable or innocent defendants, whose involvement in the unlawful conduct may have been only peripheral or nonexistent. A court-made rule of law can thus be turned into a tool for collusion, coercion and unfairness. Contribution rights, on the other hand, ensure that antitrust violators cannot escape or substantially limit treble damage liability. Even-handed

deterrence that properly reflects the goals of private antitrust enforcement is achieved by contribution. Fair apportionment of damage liability "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 n.11 (1975).

III. Contribution and Claim Reduction Promote Fairness in Antitrust Litigation

Contribution principles are rules of equity designed to promote fairness and justice. Many courts, including this Court, have sought to achieve the paramount objective of fairness in litigation by adopting rules of contribution, recognizing that any other rule is simply unfair and unjust. As this Court stated in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974):

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

Id. at 111, *quoting The Max Morris*, 137 U.S. 1, 14 (1890). *See also Glus v. G.C. Murphy Co.*, 23 FEP Cases 86, 88 (3d Cir., June 27, 1980) ("It is now widely recognized that fundamental fairness demands a sharing of the liability."); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979) ("There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone . . . ."); *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979) (contribution results in a "'more equal distribution of justice'"); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (there is an "obvious lack of sense and justice" in a no-contribution rule); *Gomes v. Brodhurst*, 394 F.2d 465, 467

(3d Cir. 1968) (contribution is "a rule of reasoned fairness").[33]

Georgia-Pacific firmly believes that contribution rules will in fact enhance deterrence of wrongdoing and will promote the other objectives of private enforcement of the antitrust laws. Nevertheless, in the final analysis, it is, and should be, the judicial sense of fairness, equity and justice that counsels most compellingly for adoption of contribution rules in the antitrust arena just as in other substantive fields of the law. "The deciding factor . . . is fairness between the parties." *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979). *See also Heizer Corp. v. Ross*, 601 F.2d 330, 333 (7th Cir. 1979).

Implementing the "equal distribution of justice" brought about by contribution necessarily requires appropriate application of that rule in a manner that will not unfairly impact upon the settlement process, for it would make no sense to adopt a rule of fairness as between defendants that would operate unfairly as to settling defendants. Georgia-Pacific does not believe this Court should adopt a rule of contribution without providing for its implementation where settlements have been reached. Claim reduction is inextricably tied to the contribution issue in the factual context now before the Court.

Claim reduction, or a proportionate reduction of a plaintiff's claim against nonsettling defendants to reflect the portion of the plaintiff's claim he has settled with jointly and severally liable codefendants, is an equitable rule of contribution that has been applied in the settlement context and is

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[33] As the Court of Appeals in *Gomes*, adopting contribution rules in the settlement context, observed:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.

394 F.2d at 467-68.

essential for this and other antitrust cases. Under this equitable contribution rule, the plaintiff's claim is adjusted to reflect his partial settlement of that claim and nonsettling defendants' contribution claims against settling defendants are made moot. In this way, all parties are accorded fair treatment: settling defendants are relieved of exposure to contribution claims, nonsettling defendants are not forced to shoulder an inordinate exposure to damages swollen solely by reason of the fact that codefendants have settled, and the plaintiff "cannot complain of unfairness, since '. . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer.'" *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 37 (1954) (Brennan, J.), *quoting McKenna v. Austin*, 134 F.2d 659, 666 (D.C. Cir. 1943).[34]

As in other substantive areas of the law in which contribution rights have been applied, courts have properly balanced the principles of contribution and compromise through claim reduction. In *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968), for example, the Court of Appeals for the Third Circuit held that the plaintiff's judgment against a nonsettling defendant was to be reduced by an amount that reflected the settling tortfeasor's respective share of fault. *Id.* at 468-69.[35] As the court in *Gomes* recognized, this rule was

[34] *See also* Gomes v. Brodhurst, 394 F.2d 465, 467-70 (3d Cir. 1968); Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962); Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 767-68 (Tex. 1964).

[35] Claim reduction in *Gomes* was viewed as the proper resolution of the issue of the "extent, if at all, [to which] the judgment against appellant [should] be reduced to reflect any right of contribution he might have." 394 F.2d at 467. The court approached this issue of Virgin Islands common law with full recognition that the result "should be consistent with the long-standing policy considerations underlying any system of contribution: the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.*

designed to implement "a system which provides for the equitable distribution of liability for joint fault and yet encourages out-of-court settlements.... The fairness of such a system is evident." *Id.* at 468.

Similarly, in *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962), the court concluded that claim reduction was the most sensible means of reconciling the possible conflict between the inherent justice of the contribution doctrine and the injured party's right to settle its claim with less than all of the parties who have caused him harm. *Id.* at 723-24. Fairness to all litigants was the court's paramount objective:

> It is true that in a case like the present one, where the verdict figure is in excess of twice the settlement figure, the application of this formula will necessarily reduce the amount of the injured plaintiff's recovery. However, the answer to objection to the formula on this account is that, by his settlement, the plaintiff has sold one-half of his claim for damages. Anything else would be unfair to the settling tort-feasor, who has bought his peace, and unfair to the defendant tort-feasor, who should not be disadvantaged by a settlement to which he was not a party and to which he did not consent.

Id. at 724 (footnote omitted). *See also Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979) ("Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault."); *Doyle v. United States*, 441 F. Supp. 701, 712 n.5 (D.S.C. 1977) (nonsettling defendant should receive equitable reduction of verdict based upon settling defendant's proportionate share of total damages).

In *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954), the court, by Mr. Justice Brennan (then a Justice of the Supreme Court of New Jersey), used judicial claim reduction to achieve the "basic purpose" of New Jersey's contribution law: "to achieve the 'sharing of the common responsibility according to equity and natural justice'

. . . ." *Id.* at 92, 110 A.2d at 36, *quoting Sattelberger v. Telep*, 14 N.J. 353, 367, 102 A.2d 577, 584 (1954).[36] Claim reduction was found to be "clearly preferable" to " 'blend the themes of compromise and contribution' ":

> Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since " . . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." *McKenna v. Austin*, [134 F.2d 659 (D.C. Cir. 1943)] *supra*. Thus, if the settlement is not collusive, he makes it upon the basis of his own appraisal of the risks of recovery and will hardly be deterred from it because it may later eventuate that he accepted less than the settler's *pro rata* share.

Id. at 93, 110 A.2d at 36-37.

The courts that have adopted claim-reduction rules have, as illustrated by the foregoing cases, sought to apply that contribution rule of fairness by carving out a proportionate share of the injured party's claim because of a partial settlement of that claim. In this horizontal-restraint-of-trade case, claim reduction based upon reduction of the plaintiffs' claim by an amount proportionately related to the settling defendants' sales of the products in question is a fair rule that would not increase the complexity of the litigation. In *Little Rock School District v. Borden, Inc.*, 1980-1 Trade Cas. ¶

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[36]The wrongful conduct involved in *Judson* was fraud, an intentional tort, to which the court held that New Jersey's contribution rules should apply. 17 N.J. at 87-91, 110 A.2d at 32-36; *see* pp. 17-19 *supra*.

63,059 (E.D. Ark. 1979), a district court applying the directive of the Court of Appeals for the Eighth Circuit to "fashion a rule of contribution which will protect the rights of settling defendants"[37] found claim reduction by elimination of claims based upon settling defendants' sales to be "the only possible viable alternate" in that horizontal price-fixing case. *Id.* at 77,252.

In such cases, the gains from higher-than-competitive prices are reaped by the wrongdoers on the basis of their relative shares of total sales of the product affected by their conduct.[38] Apportionment of liability on that basis, therefore, provides a fair approximation of each participant's gain from the conduct. Claim reduction on this basis also is free of administrative difficulties, because market shares are readily determinable and, if not the subject of a stipulation or otherwise to be found for purposes of the case, easily could be determined by the factfinder. Thus, such application of contribution rights brings about a fair treatment of all litigants while not undermining the goal of efficient management of antitrust litigation.

Moreover, such a rule will not discourage fair settlements. If parties wish to settle, they will do so. But they will do so on the basis of their assessment of the strengths and weaknesses of the claims and defenses involved, just exactly as they do in litigation that does not involve claims against multiple defendants. Only the demonstrated unfairness and realized opportunity for abuse brought about by a denial of contribution rights will be removed from the settlement process. This Court's sense of justice certainly should require no less.

[37]Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979).

[38]In M.D.L. 310 the class action plaintiffs' entire settlement strategy was based upon settlement amounts demanded "per point" of each defendant's market share. Settlements were evaluated, negotiated and justified to the court as fair and reasonable on the basis of plaintiffs' calculations of each defendant's market share. *See* pp.6-7 *supra*; Westvaco Br. at 4-7, 31-34.

CONCLUSION

For all the foregoing reasons, petitioner Georgia-Pacific Corporation respectfully submits that this Court should reverse the decision of the Court of Appeals for the Fifth Circuit and remand the case to the District Court with directions to apply contribution rights among defendants in all cases pending as part of M.D.L. 310. These rights should be enforced by permitting cross-claims and third-party claims for contribution and, where settlements have occurred, by reducing the settling plaintiffs' claims by appropriate amounts to reflect the portions of such claims that are based upon sales of corrugated containers and sheets by settling defendants and by barring contribution claims against those settling defendants.

Respectfully submitted,

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NO. 79-972

IN THE

Supreme Court of the United States

October Term, 1979

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
AND GEORGIA-PACIFIC CORPORATION,
Petitioners

v.

ADAMS EXTRACT COMPANY, ET AL,
Respondents

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER PACKAGING CORPORATION OF AMERICA

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OPINIONS BELOW

The opinion of the Court of Appeals is not reported and appears in the Joint Appendix ("J.A.") at page 277. The opinion of the United States District Court for the Southern District of Texas is reported at 84 F.R.D. 40 and appears in the J.A. at page 259.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 30, 1979. The petition for a writ of certiorari was filed on December 21, 1979, and the Writ of Certiorari was granted on June 16, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dolars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(2) 15 U.S.C. § 15. Suits by persons injured; amount of recovery

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee.[1]

STATEMENT OF THE CASE

Packaging Corporation of America ("PCA") adopts the Statement of Case made in the Brief for Petitioner, Westvaco Corporation ("Westvaco"), other than the commentary therein concerning the fact of Westvaco's notice to other Defendants of its intention to assert rights of contribution. Except as necessary to distinguish the position of PCA in this case, no further statement will be made.

This case results from a denial by the District Court of motions by Petitioners, Westvaco, Georgia-Pacific Corporation and PCA, for leave to assert cross-claims for contribution against other Defendants who had previously settled. These motions were denied by Pretrial Order No. 13, dated May 30, 1979, and appeals were taken. On October 30, 1979, the United States Court of Appeals for the Fifth Circuit affirmed that order.

On December 20, 1979, Petitioners filed a joint petition for a writ of certiorari which was granted. Prior to the issuance of the Writ of Certiorari and as trial in the District Court became imminent, PCA entered into a settlement agreement, dated March 20, 1980, providing for settlement of the class action against it for an eight million dollar ($8,000,000.00) cash payment. By pretrial

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1. The issue of contribution is not directly or indirectly mentioned or referred to in these provisions and there is no other statutory provision governing or alluding to this question. A review of the legislative history of the federal antitrust laws has led one commentator to conclude that "Congress probably did not consider the contribution issue". *See* Note, ***Contribution Among Antitrust Defendants***, 33 VAND.L.REV. 979, 996 (1980).

Order No. 50, dated May 6, 1980, PCA's settlement agreement was preliminarily approved by the District Court, and PCA, together with certain other Defendants who had settled, was excused from further trial participation. Appendix A. Thereafter, a motion for severance by PCA was granted by Pretrial Order No. 52, dated May 20, 1980. Appendix B.

Until the expected final approval of its settlement occurs, PCA continues to be a Defendant that has not settled.

SUMMARY OF ARGUMENT

Fundamental fairness requires that the principle of contribution be applicable in federal antitrust cases. A rule barring contribution among multiple alleged violators in such actions inequitably saddles an individual defendant not only with damages for his own conduct but also for that of others whom the plaintiff fails to sue or with whom the plaintiff settles.

Claim reduction is recognized as the proper method of applying contribution in cases where some defendants have settled. Claim reduction does not expose a settling defendant to additional liability and would permit settlements in federal antitrust cases to be final.

ARGUMENT

I. Contribution is Necessary to Promote Fairness and Prevent Coercion.

Contribution is an equitable principle arising from the proposition that those jointly responsible for harm should fairly share the burden of resulting liability. Even in the

absence of express statutory authority, federal courts have applied the principle of contribution in a variety of contexts. Westvaco's Brief persuasively argues that a bar to contribution in federal antitrust cases is unfair and permits defendants to be unreasonably coerced into settlements. PCA concurs in that portion of Westvaco's argument.

PCA's experience in this litigation vividly illustrates that a rule barring contribution is unfair. As this case progressed, PCA was compelled to continuously reassess its position, not with respect to the merits of its defenses, but in light of the burgeoning consequences of failure. As each succeeding settlement shifted potential liability arising out of the settler's conduct to the remaining Defendants, PCA's exposure to the Plaintiff's multi-billion dollar claims expanded. Eventually, after the population of non-settling Defendants had become substantially diminished, the consequences of failure became so overwhelming that they ceased to bear any rational relationship to even the Plaintiff's allegations as to PCA's conduct. PCA, confronted with gambling the company in litigation, chose to settle.

II. Claim Reduction is a Proper Method of Applying Contribution.

Claim reduction requires that in computing any damages assessed against a defendant, the amount of damages attributable to the conduct of a settling or unnamed defendant be excluded. Federal courts have recognized that claim reduction is a proper method of applying the principle of contribution. Research has failed to disclose any federal decision holding that claim reduction is not a proper method of applying contribution.

In *Martello v. Hawley,* 300 F.2d 721, 724 (D.C. Cir. 1962), a negligence case, the Court held that contribution was required to prevent collusion and to insure fairness and ruled that if the settling defendant was ascertained to be negligent, then the non-settling defendant would be required to pay only its allocated portion of the total verdict. The principle of *Martello*[2] was followed in *Gomes v. Brodhurst,* 394 F.2d 465, 467 (3rd Cir. 1968).[3] In that case, plaintiff brought a negligence action against two defendants, one of whom settled prior to trial. The issue presented to the Third Circuit was " . . . should the judgment against appellant be reduced to reflect any right of contribution he might have." *Id.* Responding in the affirmative, the Court held that the amount of any judgment should not include any damages attributable to the conduct of the settling defendant. Similarly, in *Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968), and *Dawson v. Contractors Transport Corp.,* 467 F.2d 727 (D.C. Cir. 1972) and *Doyle v. United States,* 441 F. Supp. 701 (D.S.C. 1977), contribution was applied by means of claim reduction.

State courts have also recognized the relationship between claim reduction and the principle of contribution. In *Judson v. Peoples Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954), the Supreme Court of New Jersey, presented with a state contribution statute which contained no specific provision for applying contribution when one or more defendants had settled, held that claim reduction " . . . is a logical incident of the created right of contribution. . . ." 17 N.J. at 93, 110 A.2d at 37.

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2. The holding in *Martello* was reaffirmed in *Brightheart v. McKay,* 420 F.2d 242 (D.C. Cir. 1969).

3. The holding in *Gomes* was reaffirmed in *De Laval Turbine Inc. v. West India Indus., Inc.,* 502 F.2d 259, 270 (3rd Cir. 1974).

III. Claim Reduction Does Not Discourage Settlements.

It has been asserted that a rule permitting contribution in federal antitrust cases would discourage settlements. Where there have been some settlements in a case, the application of the principle of contribution by means of claim reduction would preclude any subsequent action for contribution against a settling defendant and, thus, would preserve the element of finality that is a requisite for settlement.

A recent law review article not only supports the applicability of contribution in federal antitrust cases, but reasons that where settlements have occurred, implementation should be by means of claim reduction. Note, *Contribution in Private Antitrust Actions,* 93 HARV. L. REV. 1540 (1980). After evaluating various methods of computing contribution share, the author concludes by stating that:

> . . . a court should decrease damage awards according to the method by which it would have computed a settlor's contribution share. If contribution would have been pro rata, deductions should be pro rata; if contribution would have reflected the economic benefits accruing to a defendant, that defendant's conduct should not be considered in the computation of damages. Settling defendants should not be liable for contribution. This approach makes the incentive of any defendant to settle independent of the settlement desires of other defendants. Nonsettlors would not face liability for settlor's damages. By avoiding judicial determination of a settlor's liability, this system would avoid undermining the parties' incentives to settle. *Id.* at 1560-61.

Moreover, in *Judson v. Peoples Bank & Trust Co., supra,* the Supreme Court of New Jersey found claim reduction to be the "clearly preferable" solution to the problem of applying contribution with respect to settlements. Mr. Justice Brennan, then a Justice of the Supreme Court of New Jersey, reasoned that:

> [t]he problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible. . . . Collusive settlements are wholly ineffective when a credit of the settler's pro rata share is the required result of any settlement, and this helps attain one of the objectives . . . of contribution. . . . And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since . . . the reduction would be a direct result of his own act in accepting less than [the settler's pro rata share of] the total recoverable damages in settlement with the compromising wrongdoer. 17 N.J. at 92-93, 110 A. 2d at 36-37 (citations omitted).

CONCLUSION

Petitioner PCA therefore respectfully requests this Court to reverse the judgments of both the District Court and the Court of Appeals for the Fifth Circuit and to declare and hold that the principle of contribution is applicable to federal antitrust cases and that any liability adjudged against any non-settling defendant be reduced prior to trebling by claim reduction based upon an appropriate method and for such other and further relief as the court may deem proper.

We therefore submit that claim reduction is proper here.

Dated: August 26, 1980

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(ALL CLASS CASES)

IN RE CORRUGATED CONTAINER

ANTITRUST LITIGATION

PRETRIAL ORDER 50

The court having held a conference in this litigation on May 2, 1980, now enters the folowing order:

1. The proposed settlements between both plaintiff subclasses and defendants Packaging Corporation of America, Fibreboard Corporation, Potlatch Corporation, and Georgia-Pacific Corporation appear to be fair, adequate, reasonable, and negotiated in good faith and they are hereby preliminarily approved. It is understood that these four settling defendants shall not appear at or participate in the forthcoming trial with non-settling defendants; and neither the plaintiffs, with respect to these settling defendants, nor these settling defendants will be bound by the outcome of that trial.

* * *

DONE this 6th day of May, 1980, in Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

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APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

(ALL CLASS CASES)

IN RE CORRUGATED CONTAINER

ANTITRUST LITIGATION

PRETRIAL ORDER 52

The court having held conferences in this litigation on May 22, 23, 26, and 27, and having studied the numerous motions pending, enters the following order:

* * *

3. The motions of Crown-Zellerbach, Packaging Corporation of America, Georgia-Pacific, Fibreboard Corporation, Potlatch Corporation, and the Fibre Box Association for severance are GRANTED. Any trial of these six causes shall be stayed pending final resolution of their settlements with the class.

* * *

DONE this 28th day of May, 1980, in Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

NO. 79-972

IN THE

Supreme Court of the United States

October Term, 1979

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA,
AND GEORGIA-PACIFIC CORPORATION,
Petitioners

v.

ADAMS EXTRACT COMPANY, ET AL,
Respondents

**On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit**

BRIEF FOR PETITIONER PACKAGING CORPORATION OF AMERICA

QUESTION PRESENTED

Whether a defendant in an antitrust case may assert a right of contribution with respect to another alleged violator by cross-claim, impleader, or a separate action or, in the event such violator has settled, by claim reduction?

LIST OF ALL PARTIES TO THE PROCEEDING

LIST OF RESPONDENTS

A. Plaintiffs-Respondents:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.

Plaintiffs-Respondents

Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.

Plaintiffs-Respondents:

The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsbury Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

B. Defendants-Respondents:

Boise Cascade Corporation
Champion International, Inc.

Defendants-Respondents:

The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Stone Container Corporation
Union Camp Corporation
U. S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Weyerhaeuser Company
Williamette Industries

C. Co-Petitioners:

Westvaco Corporation
Georgia-Pacific Corporation

D. The Solicitor General of the United States

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Supreme Court, U. S.
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No. 79-972

IN THE

Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER WESTVACO CORPORATION

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IN THE

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October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER WESTVACO CORPORATION

Question Presented

Whether defendants in antitrust cases may assert rights of contribution.

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[1] The 133 respondents are identified in Appendix ("App.") A to the Petition for Certiorari. One hundred six respondents are plaintiffs in certain antitrust actions. The remaining respondents, as well as petitioners, are defendants in one or more of those actions.

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In re Cement & Concrete Antitrust Litigation, M.D.L. 296 (D. Ariz.), reported at 932 Antitrust & Trade Reg. Rep. (BNA) D-2-3 (Sept. 27, 1979) and 927 Antitrust & Trade Reg. Rep. (BNA) A-1 (Aug. 16, 1979) 39
City of Atlanta v. *Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906) 13
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Globus, Inc. v. *Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968) 17

Glus v. *G.C. Murphy Co.*, 23 Fair Employment Prac. Cases (BNA) 86 (3d Cir. June 27, 1980) 12, 18

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Hooley v. *Red Carpet Corp. of America*, 1975 Trade Cases (CCH) ¶60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 34

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Luke v. *Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975) 36

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Northwest Airlines, Inc. v. *Transport Workers Union*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 48 U.S.L.W. 3813 (June 16, 1980) (No. 79-1056) 18

Odette v. *Shearson, Hammill & Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975) 18

Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1977-2 Trade Cases (CCH) ¶ 61,698 (D. Utah 1977), *affirmed*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979) 22, 23, 25, 39, 42

Palestine Contractors, Inc. v. *Perkins*, 386 S.W.2d 764 (Tex. 1964) 36, 39

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 14

Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978) 21

In re Plywood Antitrust Litigation, M.D.L. 159 (E.D. La.), reported at 859 Antitrust & Trade Reg. Rep. (BNA) A-18 (April 13, 1978) 39

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Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir.), *en banc rehearing denied* (April 17, 1979) 14, 15, 19, 20, 23, 25, 26-27, 37, 39, 41, 43

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Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 11

Union Stock Yards Co. v. *Chicago, Burlington & Quincy Railroad*, 196 U.S. 217 (1905) 12

United States v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *affirmed*, 326 U.S. 1 (1945) 13

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United States v. *International Paper Co., et al.*, Crim. No. H-78-11 (S.D. Tex. 1978) 3

United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 12, 16, 34-35, 44

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 28, 29

Wassel v. *Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *affirmed*, 542 F.2d 1235 (4th Cir. 1976) 12, 17

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *en banc rehearing denied*, 608 F.2d 524 (1979), *petition for cert. filed sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 48 U.S.L.W. 3570 (Jan. 24, 1980) (No. 79-1144) 8, 14, 15, 20, 23, 25, 26, 29, 39, 40, 41, 42, 43

Zenith Radio Corp. v. *Hazeltine Research Inc.*, 401 U.S. 321 (1971) 13

Statutes:

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15 U.S.C. § 77k(f) 17

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15 U.S.C. § 78i(e) 17
15 U.S.C. § 78r(b) 17

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28 U.S.C. § 1254(1) 2
28 U.S.C. § 1407 4

Regulations:

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Federal Rules of Civil Procedure:

Rule 13 42
Rule 14 43
Rule 42(b) 43
Rule 54(b) 8

Other Authorities:

Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 Duke L.J. 1353 29

Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111 (1962) 25-26, 27

D. Dobbs, *Law of Remedies* (1973) 25

Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ.__(1980) (to be published) 38

PAGE

Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Lawyer 1821 (1978) 18

Friendly, *In Praise Of Erie—And Of The New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 11

J. Garrett, *Antitrust Compliance* (1978) 27

Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1 (1971) 34

Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem*, 32 U. Fla. L. Rev.__(1980) (to be published) 28-29, 38

Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A.J. 848 (1980) 29, 33

Leflar, *Contribution And Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932) 24

Manual for Complex Litigation, § 1.46 (1978) 25

Note, *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980) 25, 26, 27, 37-38

Panel Discussion: Private Actions—The Purposes Sought And The Results Achieved, 43 Antitrust L.J. 73 (1974) 26

Panel Discussion: Varied Approaches to Antitrust Compliance, 48 Antitrust L.J. 53 (1980) 27

W. Prosser, *Law of Torts* (4th ed. 1971) 42

Recent Developments, *Contribution Among Antitrust Defendants*, 33 Vand. L. Rev. 979 (1980) 25

Rowe, *On Fostering Fights*, N.Y. Times, Aug. 6, 1980, at A-21 34

Rudnitsky & Blyskal, *Getting into Those Deep Pockets*, Forbes 59 (Aug. 4, 1980) 4

No. 79-972

IN THE

Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER WESTVACO CORPORATION

Opinions Below

The opinion of the Court of Appeals is not reported and appears in the Joint Appendix ("J.A.") at 277-78. The opinion of the United States District Court for the Southern District of Texas is reported at 84 F.R.D. 40 and appears at J.A. 259-63.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 30, 1979. The Petition for Certiorari was filed on December 21, 1979, and was granted on June 16, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Statement of the Case

Petitioners Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("PCA"), and Georgia-Pacific Corporation ("GP") are three of thirty-seven corrugated container manufacturers named as defendants in one or more of seventy treble-damage antitrust class and non-class actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets.[2] *In re Corrugated Container Antitrust Litigation,* M.D.L. 310 (S.D. Tex.) ("M.D.L. 310").

Plaintiffs claim their damages run into many billions of dollars. (J.A. 236) Capitalizing on this exposure, plaintiffs extracted settlements in the class actions from all but two defendants by threatening to hold each non-settling defendant jointly and severally responsible for the damages attributable to all defendants, including those which settled.

Seeking to neutralize plaintiffs' coercive settlement tactics, petitioners filed motions to assert (i) cross-claims for contribution for any damages attributable to settling defendants which petitioners might be required to pay, and (ii) affirmative defenses of "claim reduction" on the theory

[2] Corrugated containers are corrugated boxes used by a wide variety of industries to ship their products.

that plaintiffs had reduced their claims against petitioners by the amount of damages fairly allocable to the defendants with which they settled. (J.A. 74, 128, 223, 231, 238) The object of these motions was to afford petitioners the opportunity to go to trial or to settle on the merits of the case against them by confining their damage exposure to their own acts.

The district court denied leave to assert the cross-claims and the claim reduction defenses. (J.A. 250-51) With respect to the cross-claims, the court entered final judgment. (J.A. 250) The Court of Appeals for the Fifth Circuit affirmed the denial of petitioners' motions to assert cross-claims and dismissed the appeals with respect to the affirmative defenses. (J.A. 277-78)

A. Prior Government Proceedings

The civil treble-damage cases were precipitated by a federal grand jury investigation of the corrugated container industry that began in December 1975 in the Southern District of Texas. On January 25, 1978, two indictments were returned charging fourteen corrugated container manufacturers and twenty-six employees with violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

The indictments charged defendants with participating in a single conspiracy east of the Rocky Mountains to fix, raise, maintain, and stabilize the prices of corrugated containers and sheets through exchanges of pricing information dating back to 1960. None of the petitioners nor any of their employees was indicted. In fact, petitioner GP was

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[3] Certain defendants were charged with a felony. *United States* v. *International Paper Co., et al.*, Crim. No. H-78-11 (S.D. Tex. 1978). Other defendants were charged with a misdemeanor. *United States* v. *Boise Cascade Corp., et al.*, Crim. No. H-78-12 (S.D. Tex. 1978).

identified by the Government as a victim of the alleged conspiracy.[4]

Certain of the defendants pleaded *nolo contendere*.[5] The trial of the remaining defendants commenced on January 22, 1979, and lasted fifteen weeks. After less than three hours of deliberation, the jury acquitted all defendants.

B. The Civil Corrugated Container Cases

Nearly a year before the Grand Jury completed its investigation, thirty-seven class and three non-class actions were filed against manufacturers of corrugated containers.[6] These suits named as defendants the fourteeen container manufacturers which were subsequently indicted, as well as twenty-three additional companies in the industry including petitioners. Pursuant to 28 U.S.C. § 1407, these and later filed actions were consolidated in the Southern District of Texas and assigned to Judge John V. Singleton, Jr. *In re Corrugated Container Antitrust Litigation*, 441 F. Supp. 921 (J.P.M.L. 1977). Thereafter, in March 1978, plaintiffs in the class actions filed a Unified and Consolidated Complaint ("Complaint"). (J.A. 13) Defendants denied all material allegations of the Complaint.

1. Class Certification and Early Settlements

Plaintiffs filed a joint motion for class action certification on March 20, 1978. Prior to a ruling on the motion, plain-

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[4] Letter from Justice Department to counsel in criminal cases (July 21, 1978).

[5] Twelve corporate and 19 individual defendants pleaded *nolo contendere*. Charges against two individuals were dismissed.

[6] The Chairman of Plaintiffs' Steering Committee in the class actions has explained the genesis of the civil actions: "In 1976, I heard a grand jury was investigating price-fixing in the corrugated box industry. . . . I was the first in Houston to file a case." Rudnitsky & Blyskal, *Getting into Those Deep Pockets*, Forbes 59, 62 (Aug. 4, 1980).

tiffs sought and obtained "ice-breaking" pre-certification settlements with two large defendants, St. Regis Paper Company ("St. Regis") and International Paper Company ("IP"). (J.A. 266-67)

To implement their settlement strategy, plaintiffs assigned to each defendant a number of "points" corresponding to each defendant's percentage share of all defendants' sales of corrugated containers and sheets between 1972 and 1976. (J.A. 43, 151-54) On July 21, 1978, plaintiffs entered into the settlement agreement with St. Regis, an unindicted defendant, for approximately $500,000 per point, or a total of $1.7 million. (J.A. 30, 43) A month later, on August 25, 1978, plaintiffs entered into the agreement with IP, a company that had been charged with a felony and subsequently pleaded *nolo contendere.* IP agreed to pay $1 million per point, or $8.3 million. (J.A. 31, 43)

On September 6, 1978, the district court certified a class of all purchasers of corrugated containers or sheets from defendants during the period between January 1, 1960 and January 25, 1978, estimated to include more than 200,000 members. *In re Corrugated Container Antitrust Litigation,* 80 F.R.D. 244 (S.D. Tex.), *mandamus denied,* No. 78-3684 (5th Cir. 1978). Class certification set the stage for the settlements which followed. On December 13, 1978, plaintiffs announced a settlement agreement with Union Camp Corporation ("Union Camp"), an unindicted company, for $2 million per point, an amount that was twice as much per point as had been paid by IP, an indicted company. (J.A. 158-62)

The Union Camp settlement set in motion a "settlement stampede." The defendants engaged in a footrace with each other to settle before the price went up. Within two weeks, plaintiffs concluded eight new settlements at successively higher amounts ranging up to $4.5 million per point for

indicted companies and up to $2.75 million per point for unindicted companies. (J.A. 162-65)

From December 26, 1978 to January 5, 1979, plaintiffs declared a "moratorium" on settlements. (J.A. 166) Thereafter, settlements were offered at increasingly higher amounts, and during the next two weeks nine more settlements were reached totalling over $210 million. (J.A. 166-71) With each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate per point than prior settlements.

Plaintiffs were able to escalate their settlement demands because with joint and several liability, in the absence of contribution or claim reduction, the exposure faced by each non-settling defendant increased with each successive settlement. (J.A. 38) The amount of each settlement was determined by the timing of other settlements rather than by the merits of the case against each settling defendant. For example, The Continental Group, Inc. ("Continental"), which was later acquitted in the criminal case, settled at a rate six and one-half times greater than the rate paid earlier by IP. Certain unindicted defendants, confident of their innocence, were nevertheless compelled by economic pressures to accede to plaintiffs' settlement demands in order to avoid the loss of credit or in order to continue operations.[7]

Thus, before even one deposition had been taken in M.D.L. 310, twenty-four indicted and unindicted defendants collectively had paid over $288 million in only five weeks. Shortly thereafter, two additional defendants settled, bringing the total amount paid to approximately $300 million, representing settlements by over eighty percent of the market. This

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[7] *See, e.g.*, App. A to this Brief; App. F to the Petition for Certiorari; pages 32-33, *infra*.

was said to be the largest settlement in the history of antitrust litigation. (J.A. 271) The majority of the settlements were approved by the district court on December 21, 1979, *In re Corrugated Container Antitrust Litigation,* 1980-1 Trade Cases (CCH) ¶ 63,163 (S.D. Tex. 1979), and others on March 18, 1980.

2. Assertion of Rights of Contribution and Claim Reduction

Westvaco moved on December 7, 1978, for leave to amend its answer to the Complaint to assert cross-claims for contribution against St. Regis and IP, the only defendants which had settled. (J.A. 74) Westvaco also notified all other defendants, none of which had entered into a settlement agreement, of Westvaco's intention to assert contribution cross-claims. (J.A. 74-90) Despite Westvaco's actions, all defendants which later settled failed to protect themselves against Westvaco's contribution claims. None of their settlement agreements provided for the reduction of plaintiffs' claims by the removal of damages attributable to settling defendants' sales from any damages plaintiffs might recover at trial from the non-settling defendants. (*See, e.g.,* J.A. 124)

Westvaco filed an amended motion on March 1, 1979, seeking leave to assert cross-claims against all other settling defendants. (J.A. 128) Westvaco also sought to assert an affirmative defense of "claim reduction" on the theory that, by settling with certain defendants, plaintiffs had thereby reduced their claims against the non-settling defendants by the amount of damages fairly allocable to the settling defendants' activities. (J.A. 138) Similar motions were filed by GP and PCA. (J.A. 223, 231, 238) These motions were all made before any settlements had been approved.

3. Decisions Below

The district court denied petitioners' motions with prejudice on May 30, 1979. (J.A. 250-51) Recognizing the coercive impact of settlements in the absence of contribution, the court nevertheless held that contribution was inappropriate in M.D.L. 310 because it would weaken antitrust deterrence, frustrate settlements, complicate the litigation procedurally, and inhibit joint defense efforts. (J.A. 259-63)

Finding no just reason for delay, the district court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the denial of petitioners' cross-claims. (J.A. 250) All three petitioners appealed. (J.A. 272-75) Westvaco and PCA also appealed from the denial of their affirmative defenses. (J.A. 276)

On October 30, 1979, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of petitioners' cross-claims. (J.A. 277-78) The court accepted as controlling its recent decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 48 U.S.L.W. 3570 (Jan. 24, 1980) (No. 79-1144) (*"Wilson Abraham"*), in which the majority refused to permit contribution in antitrust cases. (J.A. 278) The court dismissed petitioners' appeals with respect to claim reduction. (J.A. 278)

The Petition for Certiorari was filed on December 21, 1979, and was granted on June 16, 1980.

4. Events Occurring Subsequent to the Filing of the Petition

Petitioners PCA and GP recently settled the class actions. PCA paid $8 million, and GP agreed with two other unin-

dicted defendants to pay an undisclosed portion of a joint settlement package of $3 million.[8]

On June 9, 1980, the trial of the class actions in M.D.L. 310 began against the remaining three defendants, one of which has since settled bringing the total amount paid in settlements to over $320 million. Two defendants, including Westvaco, have gone to trial rather than submit to the unreasonable demands of the class plaintiffs. In the absence of contribution or claim reduction, Westvaco faces potential industry-wide damages under joint and several liability estimated by the class plaintiffs to be billions of dollars notwithstanding the fact that Westvaco's share of the market is approximately three and one-half percent.

Summary of Argument

This Court in the exercise of its federal common-law powers should recognize rights of contribution in antitrust cases to ensure fairness in the apportionment of damages among defendants. Contribution is recognized in various areas of federal law and is especially necessary in antitrust cases because joint and several liability, mandatory treble damages, and class actions present antitrust defendants with enormous damage exposure.

Contribution advances the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their acts. Without contribution, antitrust violators may completely escape liability or obtain preferential "sweetheart" settlements. Contribution also promotes the competitive objectives of the antitrust laws.

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[8] These settlements have not been finally approved by the district court. In addition, all three petitioners remain defendants in one or more non-class actions in M.D.L. 310. The district court denied contribution and claim reduction in these cases as well. (J.A. 250-51; Pretrial Order No. 31, ¶ 3).

Contribution will eliminate settlement coercion in antitrust cases and encourage fair settlements based on the merits of the case. This Court may effectuate contribution rights and at the same time protect settling defendants by recognizing claim reduction, which reduces claims against non-settling defendants by an amount fairly allocable to the acts of settling defendants. Furthermore, settling defendants may provide for claim reduction in their settlement agreements. Either way, claim reduction brings finality to settling defendants and fairness to non-settling defendants without compromising plaintiffs' rights.

Contribution will not complicate antitrust price-fixing cases by adding new substantive issues or presenting procedural manageability problems. Contribution liability will be established according to the same substantive standard as is used to prove antitrust liability. Furthermore, claim reduction by either operation of law or contractual agreement will simplify the proof in antitrust cases.

Recognition of contribution and claim reduction will serve the public interest in encouraging competition and strike a proper balance between (i) the interests of plaintiffs who wish to recover damages for injuries they have suffered, (ii) the interests of defendants who wish to settle on the merits of the case, and (iii) the interests of defendants who wish to assert their innocence at trial.

ARGUMENT

I.

Federal Courts Have the Power to Recognize Contribution in Antitrust Cases

This Court may recognize rights of contribution in areas of federal concern by virtue of its power to fashion federal common-law rules to govern problems which "lie in the penumbra of express statutory mandates." *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957). In that case, the Court concluded that the substantive law to be applied in suits concerning collective-bargaining agreements was "federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. *See also Illinois* v. *City of Milwaukee,* 406 U.S. 91, 103 (1972).[9] As will be demonstrated below, the Court may similarly fashion rules of contribution and claim reduction in antitrust cases in furtherance of antitrust policies.

A. Contribution Falls Within the Common-Law Powers of This Court

Rules governing the availability of contribution are judicial in origin. At common law, a plaintiff could elect to bring suit against fewer than all joint tortfeasors and could choose to execute the full amount of a judgment against any one of multiple defendants. Under English decisions, the judgment-debtor was powerless to recover the appropriate proportional share of damages attributable

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[9] *See Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 392-403 (1970); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943); *Royal Indem. Co.* v. *United States,* 313 U.S. 289, 296 (1941); *Board of County Comm'rs* v. *United States,* 308 U.S. 343, 349-52 (1939). *See generally* Friendly, *In Praise Of Erie—And Of The New Federal Common Law,* 39 N.Y.U. L. Rev. 383 (1964).

to his joint tortfeasors. *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). Contribution was generally prohibited by courts in this country in an exercise of their common-law powers. *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy Railroad*, 196 U.S. 217, 224 (1905).

The unfairness of the rule barring contribution led courts to reconsider its desirability. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court decided to "ameliorat[e] the common-law rule against contribution" in maritime noncollision cases. *Id.* at 111. *See also United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

Lower federal courts have similarly developed the federal law of contribution in areas of special federal concern. In the absence of statutory provisions, federal common-law contribution rights have been recognized in employment discrimination cases,[10] securities cases,[11] and airline disaster cases.[12] Indeed, the Third Circuit viewed the contribution question as falling within the "responsibility of federal courts to define the body of federal common law which arises from the interstices of federal legislation." *Glus* v. *G.C. Murphy Co.*, 23 Fair Employment Prac. Cases (BNA) 86, 89 (3d Cir. June 27, 1980). The remedies provided by Congress "are not necessarily the only federal remedies available," and "there is a federal common law" in areas of special federal concern. *Illinois* v. *City of Milwaukee, supra*, 406 U.S. at 103.

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[10] *Glus* v. *G.C. Murphy Co.*, 23 Fair Employment Prac. Cases (BNA) 86, 88-90 (3d Cir. June 27, 1980).

[11] *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel* v. *Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed*, 542 F.2d 1235 (4th Cir. 1976).

[12] *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

B. Antitrust Is an Area of Special Federal Concern in Which Rights of Contribution Are Cognizable

Antitrust is clearly an area of special federal concern in which rights of contribution are cognizable as a matter of federal common law. The substantive liability of an antitrust defendant is determined by the provisions of the Sherman Act in conjunction with common-law principles, as this Court has repeatedly recognized:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. *United States*, 435 U.S. 679, 688 (1978) (footnote omitted). As Judge Learned Hand stated, "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States* v. *Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *affirmed*, 326 U.S. 1 (1945).

Accordingly, federal courts have routinely resolved issues ancillary to application of the Sherman and Clayton Acts through exercise of federal common-law powers. It was the federal courts that applied principles of joint and several liability to the antitrust laws by analogizing violators to joint tortfeasors. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906). Federal common law determines the effect of a release under the antitrust laws, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 343-48 (1971), and the availability of the *in pari delicto*

defense in federal antitrust actions, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 137-40 (1968).

Almost forty years ago, in holding that the principles of estoppel to be applied in an antitrust context were matters of federal common law, this Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).[13]

Moreover, there is no indication in the legislative history of the Sherman Act or the Clayton Act that Congress considered the question of contribution.[14] *Profes-*

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[13] Courts considering contribution in antitrust cases have all concluded that the question should be determined as a matter of federal law. *See, e.g., Wilson P. Abraham Constr. Corp.* v. *Texas Indus., Inc.*, 604 F.2d 897, 900-01 (5th Cir. 1979); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979).

[14] This case involves the Clayton Act, which expressly provides that persons who violate the Sherman Act shall be subject to civil liability. Petitioners are not asking this Court to imply a private cause of action within the meaning of *Cort* v. *Ash*, 422 U.S. 66 (1975), or its progeny. In such cases, the Court has examined legislative history to determine whether subjecting a party to implied civil liability for violating a statutory standard of conduct is consistent with congressional intent. In contrast, the question in this case is simply whether petitioners have rights of contribution against parties whom Congress has intended to be civilly liable under the antitrust laws.

sional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1183 (8th Cir. 1979); *Wilson Abraham, supra,* 604 F.2d at 900. Accordingly, judicial resolution of the issue is appropriate.

II.

Contribution Promotes Fairness by Ensuring Equal Distribution of Justice

The traditional common-law rule against contribution unfairly forces a defendant to absorb the consequences not only of his own acts but also those of his joint tortfeasors. The common-law bar to contribution is especially unjust in antitrust cases when joint and several liability is coupled with massive class action damage exposure, such as in M.D.L. 310.[15] Thus, the issue of contribution has come to the forefront of antitrust litigation.

The obvious inequity of the common-law rule has led federal courts to permit contribution in order to ensure a more equitable apportionment of damages. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court permitted contribution between joint tortfeasors in maritime noncollision cases. Speaking through Mr. Justice Marshall, the Court adopted a "division of damages" rule on the grounds that contribution was necessary to ensure fairness in the allocation of loss:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against

[15] Under Section 4 of the Clayton Act, 15 U.S.C. § 15, a person injured by reason of a violation of the antitrust laws is entitled to treble damages. It has been held that damages are trebled before amounts recovered in settlement with any defendants are deducted. *See Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 397-98 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957).

> contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris,* [137 U.S. 1 (1890)], at 14.

417 U.S. at 111.

Only one year later, this Court's concern for fairness compelled abandonment of the division of damages rule, whereby parties paid damages on a pro rata basis, in favor of a more equitable system of damage allocation based upon comparative fault. *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975). Taking notice of the increasing disfavor with which the lower courts had come to regard the outmoded rule, the Court concluded that the divided damages rule was inequitable:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case.

Id. at 405 (footnote omitted).

The Court thereupon held that the elimination of potential unfairness required judicial adoption of a rule providing for "just and equitable" allocation of damages. *Id.* at 411. Indeed, by 1979 this Court observed that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor. . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor." *Edmonds* v. *Com-*

pagnie Generale Transatlantique, 443 U.S. 256, 271-72 n.30 (1979).

The principle of "equal distribution of justice," *Cooper Stevedoring, supra,* 417 U.S. at 111, through elimination of unfairness in the allocation of damages has been applied by federal courts in a steady movement toward recognition of contribution rights in numerous areas.

Thus, contribution is broadly permitted under the federal securities laws.[16] The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly provide for contribution in certain circumstances.[17] However, courts have also permitted contribution in securities cases in the absence of specific statutory authorization without regard to whether the underlying cause of action is express or implied. *Compare Wassel* v. *Eglowsky,* 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed,* 542 F.2d 1235 (4th Cir. 1976), *with Heizer Corp.* v. *Ross,* 601 F.2d 330, 331-33 (7th Cir. 1979).

In *Heizer,* the Seventh Circuit permitted contribution among defendants in a Rule 10b-5 context in order to permit "a 'more equal distribution of justice,' " *id.* at 332, citing *Cooper Stevedoring.* Contribution ensures that "the burden

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[16] Contribution is available in securities cases without regard to whether the wrongful conduct of the party seeking contribution was intentional or unintentional. In *Globus, Inc.* v. *Law Research Serv., Inc.,* 318 F. Supp. 955 (S.D.N.Y. 1970), *affirmed,* 442 F.2d 1346 (2d Cir.), *cert. denied.* 404 U.S. 941 (1971), the court allowed contribution where the evidence showed fraudulent, wanton and willful misconduct by the party seeking contribution. *Globus, Inc.* v. *Law Research Serv., Inc.,* 287 F. Supp. 188, 192 (S.D.N.Y. 1968). *See Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.,* 385 F. Supp. 230, 238-39 (S.D.N.Y. 1974).

[17] Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f); sections 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) and § 78r(b).

of satisfying a judgment or settlement would be equitably borne by the parties responsible for the loss." Fischer, *Contribution in 10b-5 Actions,* 33 Bus. Lawyer 1821, 1827 (1978).[18]

Contribution is also recognized to promote fairness in other areas of the law. In *Glus* v. *G.C. Murphy Co., supra,* the Court of Appeals for the Third Circuit recently affirmed the right of an employer who had settled with a plaintiff class for alleged violations of Title VII of the Civil Rights Act of 1964 to cross-claim for contribution against a union.[19] Judge Higginbotham stated:

> The rule prohibiting contribution has come into disrepute. It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants.

23 Fair Employment Prac. Cases (BNA) at 88.

Similarly, in *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975), the court permitted contribution in airline disaster cases notwithstanding the absence of any statutory authorization. It rejected "as being outmoded and entirely unsatisfactory,

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[18] *See McLean* v. *Alexander,* 449 F. Supp. 1251, 1266-67 (D. Del. 1978), *reversed on other grounds,* 599 F.2d 1190 (3d Cir. 1979); *Odette* v. *Shearson, Hammill & Co.,* 394 F. Supp. 946, 958 (S.D. N.Y. 1975); *Liggett & Myers Inc.* v. *Bloomfield,* 380 F. Supp. 1044, 1045-46 (S.D.N.Y. 1974); *Altman* v. *Liberty Equities Corp.,* 54 F.R.D. 620, 625 (S.D.N.Y. 1972).

[19] The Third Circuit decided this case after certiorari was granted in *Northwest Airlines, Inc.* v. *Transport Workers Union,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 3813 (June 16, 1980) (No. 79-1056).

the contention that the federal rule should be one of 'no contribution.' " *Id.* at 405.[20]

Finally, in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) *("Professional Beauty Supply")*, the first appellate court ever to consider the contribution issue in an antitrust context held unequivocally that fairness requires the application of contribution. In that case, a distributor filed suit against another distributor alleging that the defendant had conspired with a supplier, not named as a defendant, to terminate plaintiff's franchise. After confirming in pretrial discovery that plaintiff's claims were based on the alleged conspiracy between the defendant and the supplier, the defendant filed a third-party complaint for contribution against the supplier. The complaint was dismissed by the district court.

The Eighth Circuit reversed and adopted a rule of contribution for antitrust cases. The court specifically relied (*id.* at 1183) upon *Cooper Stevedoring* and recognized that contribution in treble-damage actions was necessary to ensure fundamental fairness:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer. [citation omitted]
>
> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.

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[20] *See also Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (adopting contribution in negligence cases in the Virgin Islands); *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (adopting contribution in negligence cases in the District of Columbia).

594 F.2d at 1185-86.[21]

The considerations which compelled recognition of contribution in *Professional Beauty Supply* and other cases are magnified in M.D.L. 310. Petitioners and all other defendants in this case have been forced to choose between acceding to plaintiffs' coercive settlement demands or risking massive industry-wide damages at trial. Thus, contribution is particularly appropriate to ensure fairness in the allocation of damages in M.D.L. 310.

To prohibit contribution in antitrust cases would be inequitable and out of keeping with contemporary standards of fairness. The removal of the anachronistic bar to contribution by this Court, *see Cooper Stevedoring, supra,* 417 U.S. at 110, illustrates that fairness requires recognition of contribution.[22]

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[21] Despite the Fifth Circuit's statement in *Wilson Abraham* that it had considered the arguments set forth in *Professional Beauty Supply,* the court did not discuss fairness considerations. *Wilson Abraham, supra,* 604 F.2d at 900. Of course, the Fifth Circuit panel that decided the Westvaco appeal did not address the issue because it summarily relied upon the *Wilson Abraham* decision. (J.A. 278)

[22] The issue of claim reduction, a concomitant to contribution, arises if contribution in antitrust cases is recognized. When some defendants have settled, contribution rights against settling defendants may be effectuated through claim reduction. *See* pages 35-38, *infra.*

III.

Contribution Promotes Policies Underlying the Antitrust Laws

Contribution promotes policies underlying the antitrust laws because it ensures that antitrust violators will be held accountable for their conduct. In addition, the absence of contribution may discourage or reduce competition.

The treble-damage remedy of the Clayton Act advances three goals. First, it provides a means by which victims of antitrust violations may be compensated for their injuries. Second, it deprives violators of the antitrust laws of the fruits of their illegal conduct ("disgorgement"). Third, it serves to deter future violations. *See Pfizer Inc.* v. *Government of India,* 434 U.S. 308, 314 (1978); *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 746 (1977).

Contribution does not affect the right of a plaintiff to be compensated because a plaintiff may collect a judgment entirely from any defendant found to have violated the antitrust laws.[23] Accordingly, courts considering whether contribution should be recognized in antitrust cases have focused upon the other two objectives of the treble-damage remedy.

Absent a rule of contribution, the disgorgement and deterrence objectives of the antitrust laws are needlessly undermined.

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[23] *See Hennessey* v. *National Collegiate Athletic Ass'n,* 564 F.2d 1136, 1147 (5th Cir. 1977); *S.P.A. Ricordi Officine Grafiche* v. *World Art Reproductions Co.,* 22 F.R.D. 312, 316 (S.D.N.Y. 1958).

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct

In numerous situations, the absence of contribution permits antitrust violators completely to escape liability or to obtain "sweetheart" settlements not commensurate with damages they may have caused.

1. Contribution Prevents Wrongdoers From Completely Escaping Antitrust Liability

Contribution is necessary to ensure that persons who violate the antitrust laws do not completely escape liability. Absent contribution, violators of the antitrust laws are not deprived of the fruits of their illegal conduct.

For example, in *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), fourteen egg producers brought an antitrust action solely against Olson Farms, Inc. ("Olson Farms") alleging that five egg distributors, including Olson Farms, had fixed the prices at which they purchased eggs from plaintiffs. Although Olson Farms was responsible for only eleven percent of these purchases, none of the other alleged co-conspirators was sued. At the trial, one of the plaintiffs testified that the other distributors had not been sued in order to avoid disrupting the ongoing business relationships between the plaintiffs and the nondefendant distributors.[24]

The jury returned a verdict for plaintiffs, and judgment was entered against Olson Farms for $2.4 million based on damages attributable to the purchases of all five distributors. The Tenth Circuit affirmed, 541 F.2d 242 (1976),

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[24] *See* Petition for Rehearing at 4, n.2, *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979).

cert. denied, 429 U.S. 1122 (1977), and Olson Farms satisfied the judgment in full.

Thereafter, Olson Farms sought contribution from the four other distributors which had been found to have participated in the illegal conduct in *Cackling Acres* and whose purchases had been included in computing damages. The district court dismissed the complaint, *Olson Farms, Inc.* v. *Safeway Stores, Inc.,* 1977-2 Trade Cases (CCH) ¶ 61,698 (D. Utah 1977), and the Tenth Circuit affirmed, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). The court ignored the fact that companies responsible for nearly ninety percent of plaintiffs' damages completely escaped liability and held that Olson Farms had no right of contribution.[25]

The Court of Appeals for the Eighth Circuit reached a contrary result when confronted with similar facts. Thus, in *Professional Beauty Supply,* 594 F.2d 1179 (8th Cir. 1979), the court, in recognizing contribution for antitrust defendants, stated:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go *"scot free."* This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

Id. at 1185 (emphasis added). *See* pages 19-20, *supra.* Contribution, therefore, prevents antitrust violators from com-

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[25] Similarly, in *Wilson Abraham, supra,* 604 F.2d at 899, Texas Industries, the sole defendant in a treble-damage action, was denied leave to assert contribution even though it was only one of three companies which had pleaded *nolo contendere* to related price-fixing charges.

pletely escaping liability. *See generally* Leflar, *Contribution And Indemnity Between Tortfeasors,* 81 U. Pa. L. Rev. 130, 136-38 (1932).

2. Contribution Prevents Sweetheart Settlements

The disgorgement objective of the treble-damage remedy may also be frustrated even if all participants in an allegedly illegal scheme are named as defendants. Plaintiffs may enter into sweetheart settlements with selected defendants for reasons unrelated to relative culpability or the merits of plaintiffs' claims against such defendants.[26] These beneficiaries are not forced to disgorge their illegal gains.

In M.D.L. 310, class plaintiffs entered into a sweetheart settlement with IP—a felony-indictee which pleaded *nolo contendere* in the criminal cases—for (i) nearly one-fifth the rate per point of any other felony-indictee which settled during the "stampede," (ii) less than any defendant charged with a misdemeanor in the criminal cases, and (iii) a rate less than all unindicted defendants which settled during the "stampede." [27]

In the absence of contribution, plaintiffs are encouraged to offer sweetheart deals. Such settlements do not affect their potential recovery because all damages attributable to any settling defendant's activities remain in the case for purposes of damage calculation against those defendants who refuse to accede to coercion and elect to go to trial. (J.A. 38)

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[26] In fact, certain plaintiffs in this case have explained that pre-certification sweetheart settlements were sought, in part, "to favorably influence the Court's certification of a class." Joint Brief for Plaintiff-Appellant Container Purchasers at 5, *In re Corrugated Container Antitrust Litigation,* Nos. 80-1018 and 80-1103, *pending* (5th Cir.). Copies of this Brief have been filed with the Clerk of this Court.

[27] A chart setting forth the settlements in M.D.L. 310 through January 1979 is attached as App. B to this Brief.

The *Olson Farms* and *Wilson Abraham* decisions of the Tenth and Fifth Circuits denying contribution permitted certain wrongdoers to retain all the fruits of their unlawful conduct. Similarly in M.D.L. 310, certain of the more culpable defendants were able to settle cheaply on a basis that did not reflect the level of their alleged involvement.[28] The Eighth Circuit in *Professional Beauty Supply,* on the other hand, realized that contribution ensures disgorgement of ill-gotten gains by antitrust violators.[29]

B. Contribution Promotes Deterrence

In *Professional Beauty Supply,* the court recognized that denial of contribution undermines the deterrence policy of the antitrust laws:

> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

Id. at 1185. For this reason, contribution is particularly effective in deterring intentional misconduct. *Id.* at 1186. *See Olson Farms, supra,* 1979-2 Trade Cases (CCH) ¶ 62,995, at 79,706-07 (Holloway, J., dissenting); Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1544 (1980); Recent Developments, *Contribution Among Antitrust Defendants,* 33 Vand. L. Rev. 979, 983 (1980); D. Dobbs, *Law of Remedies* § 10.6, at 704-05 (1973); Corbett, *Apportionment of Damages and Con-*

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[28] The *Manual for Complex Litigation* points out at § 1.46 that "the early-settling defendants may well be those whose liability is clearest."

[29] Similarly, claim reduction furthers the disgorgement objective of the antitrust laws by ensuring that settlements will be based on the merits and will fairly reflect the illegal gains, if any, located in the coffers of each settling defendant. Thus, claim reduction discourages sweetheart settlements.

tribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Fordham L. Rev. 111, 137 (1962).[30]

The Fifth Circuit in *Wilson Abraham* rejected contribution because it believed that the possibility of massive treble-damage awards without contribution would be more likely to deter violations than increasing the certainty that all violators will be forced to bear the consequences of their conduct. In refusing to recognize contribution, the court stated:

> The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share.

604 F.2d at 901. As demonstrated below, this limited view of deterrence is predicated upon an insufficient and erroneous analysis of corporate behavior.

First, the Fifth Circuit assumed without empirical foundation that when there is no contribution, greater deterrence results from the threat of more severe but less certain penalties. The reverse assumption is equally if not more plausible.[31] Contribution leads to greater deterrence by increasing the certainty that all parties will be held responsible for their illegal conduct. *See Professional*

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[30] *See also Heizer Corp.* v. *Ross,* 601 F.2d 330, 334 (7th Cir. 1979) and cases cited in note 16, *supra; International Union of Elec., Radio & Mach. Workers* v. *Westinghouse Elec. Corp.,* 73 F.R.D. 57, 59 (W.D.N.Y. 1976); *Slotkin* v. *Brookdale Hosp. Center,* 377 F. Supp. 275, 279-80 (S.D.N.Y. 1974); *Judson* v. *Peoples Bank & Trust Co.,* 17 N.J. 67, 87-91, 110 A.2d 24, 34-36 (1954); *Maryland Lumber Co.* v. *White,* 205 Md. 180, 198-200, 107 A.2d 73, 80-81 (1954); *Taylor* v. *Kinston Free Press Co.,* 237 N.C. 551, 553, 74 S.E.2d 528, 530 (1953).

[31] *See Panel Discussion: Private Actions—The Purposes Sought And The Results Achieved,* 43 Antitrust L. J. 73, 104 (1974). *See also Contribution In Private Antitrust Actions, supra,* 93 Harv. L. Rev. at 1544-45.

Beauty Supply, supra, 594 F.2d at 1185; Corbett, *Apportionment of Damages, supra,* 31 Fordham L. Rev. at 137.

Second, even if the Fifth Circuit correctly characterized the risk factors that top level "business managers" consider when contemplating unlawful behavior, 604 F.2d at 901 n.8, the court assumed that those persons are the same individuals who engage in unlawful conduct. Middle level managers, however, are often the persons whose activities lead to alleged antitrust violations, and their behavior is not affected by the magnitude of their employers' potential penalties but rather by the possibility of detection and its impact upon their careers.[32] Contribution clearly deters such persons more than the absence of contribution:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increases the frequency of company sanctions against overzealous employees.

Contribution In Private Antitrust Actions, supra, 93 Harv. L. Rev. at 1546 (footnotes omitted).

Accordingly, the Fifth Circuit's rationale for denying contribution is unpersuasive as a practical and theoretical matter. Deterrence is, in fact, promoted by contribution.

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[32] Major corporations have adopted antitrust compliance programs in which employees are instructed in antitrust principles and directed to conform their conduct to the law. Employees who violate antitrust compliance programs are subject to discipline. *See generally* J. Garrett, *Antitrust Compliance* (1978); *Panel Discussion: Varied Approaches to Antitrust Compliance,* 48 Antitrust L.J. 53 (1980).

C. Competition May Be Discouraged or Reduced in the Absence of Contribution

A fundamental goal of the antitrust laws is to encourage and protect competition. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4-5 (1958). In the absence of contribution, (i) procompetitive conduct in certain instances may be discouraged, and (ii) small companies may be competitively weakened.

1. Procompetitive Conduct May Be Discouraged Without Contribution

This Court has observed that the Sherman Act has a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 600 (1936). This ensures that new forms of anticompetitive behavior will fall within the prohibition of the statute, but it also renders certainty in business planning extremely difficult.[33]

In *United States* v. *United States Gypsum Co.,* 438 U.S. 422 (1978), the Court noted this paradox and observed that "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41. The Court specifically noted that exchanges of price information among competitors demonstrated these uncertainties because such exchanges might be procompetitive or anticompetitive depending upon the nature of the exchange and the market structure of the industry involved.

Prohibition of contribution magnifies the "distinct possibility of overdeterrence" against which this Court cautioned in *Gypsum. Id. See* Jacobson, *Contribution Among Anti-*

[33] Upon proof of a violation of the antitrust laws and damages, a plaintiff may recover even if the liability question is a close one or new rules of law are established. *Simpson* v. *Union Oil Co.,* 396 U.S. 13 (1969).

trust Defendants: A Necessary Solution To A Recurring Problem, 32 U. Fla. L. Rev.__(1980) (to be published). Procompetitive conduct "might be shunned by businessmen who chose to be excessively cautious." *Gypsum, supra,* 438 U.S. at 441. *See generally* Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy,* 1978 Duke L.J. 1353, 1366-72. In the absence of contribution, competitors may refrain from engaging in procompetitive conduct because of the risk of being held liable not only for their own acts but also for the acts of others.[34]

2. Small Companies May Be Competitively Weakened Without Contribution

In the absence of contribution, settlement coercion imposes an intolerable burden on small companies. These firms cannot risk the possibility of a verdict placing the damages attributable to an entire industry on their shoulders. As a result, they are utterly vulnerable to plaintiffs' escalating settlement demands. *See* Janofsky, *The "Big Case": A "Big Burden" on Our Courts,* 66 A.B.A.J. 848, 849 (1980).

Small companies named as defendants in antitrust class actions have two options: comply with plaintiffs' demands or risk going out of business. The first option itself may competitively weaken a small company, as is illustrated in M.D.L. 310 by the settlements of U.S. Corrugated Fibre-Box Company ("U.S. Corrugated") and Green Bay Packaging Co., Inc. ("Green Bay").[35] And the second option

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[34] There is no indication in the opinions in *Wilson Abraham* or this case that the Fifth Circuit realized the possibility that certain procompetitive conduct could be chilled in the absence of contribution.

[35] *See* App. F to the Petition for Certiorari; App. A to this Brief. *See also* pages 5-6, *supra;* pages 32-33, *infra.*

is counterproductive and increasingly subject to criticism. As the Third Circuit recently cautioned:

> [C]ourts have been wary of permitting "overkill" recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition.

Mid-West Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979) (footnote omitted). *See also Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).[36]

A rule prohibiting contribution therefore offers the worst of both worlds. It not only interferes with the disgorgement and deterrence objectives of the antitrust laws, but also risks discouraging procompetitive conduct and weakening, if not destroying, small companies.

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[36] *See Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F. Supp. 1150, 1159-60 (S.D.N.Y. 1979); *Shapiro* v. *General Motors Corp.*, 472 F. Supp. 636, 659 (D. Md. 1979).

IV.

Contribution in Antitrust Cases Will Eliminate Settlement Coercion and Promote Fair and Final Settlements

Recognition of contribution and the concomitant right of claim reduction will eliminate settlement coercion in large antitrust class actions and will also promote fair and final settlements.

A. Contribution Will Eliminate Settlement Coercion

Courts have expressed growing concern that the aggregation of damage claims in class actions may coerce settlements without regard to the merits of plaintiffs' claims. Thus, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), this Court observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

Id. at 476. *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring).

The aggregation of claims by hundreds of thousands of class members in M.D.L. 310 confronted each petitioner and all defendants with staggering damage exposure. In the absence of contribution and claim reduction, each successive settlement increased the pressure on non-settling defendants to settle irrespective of the merits of their defenses. As each defendant settled, the exposure of the remaining non-settling defendants increased because the sales of the settling defendants remained in the case for purposes of damage calculation. (J.A. 38)

The unfairness of this coercion, which affected large and small businesses alike, is apparent from the following examples:

Continental, one of the larger defendants, pleaded not guilty in the criminal case and was acquitted by a jury. Prior to the criminal trial, but after sixteen other defendants had settled, Continental settled for $27.4 million or $6.5 million per point, the highest rate of any settling defendant and six and one-half times greater than IP. (App. B to this Brief.)

Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to IP, it paid $34.2 million or more than four times the amount paid by felony-indictee IP. (*Id.*)

U.S. Corrugated was not indicted.[37] Although it had the smallest market share of all defendants, U.S. Corrugated settled at a rate eight times higher than St. Regis and four times higher than IP. In dollar terms this was equivalent to U.S. Corrugated's after-tax profits for three and one-half years. As a result, the company was forced to close one of it plants, laying off 200 employees. (App. F to the Petition for Certiorari.)

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[37] Twenty-three companies were named as defendants in M.D.L. 310 even though they were not indicted in the criminal cases. It is not uncommon for treble-damage actions to be brought against virtually all members of an industry when a grand jury investigation becomes a matter of public knowledge or after many companies have responded to subpoenas *duces tecum*. *See, e.g., In re Fine Paper Antitrust Litigation*, 446 F. Supp. 759 (J.P.M.L. 1978); *In re Government Auto Fleet Sales Antitrust Litigation*, 328 F. Supp. 218 (J.P.M.L. 1971). Until a grand jury investigation is completed, plaintiffs have no basis for knowing which companies may be culpable. But once a company is named as a defendant in a civil case, whether fairly or unfairly, its only practical options are settlement or trial.

Green Bay, another one of the small defendants in M.D.L. 310, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay had no choice but to accept plaintiffs' demand for $3.75 million per point. Plaintiffs threatened to increase this amount if settlement were delayed. (App. A to this Brief at A-3.) As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

(*Id.* at A-5.) *See* Janofsky, *supra,* 66 A.B.A.J. at 849.

Petitioner GP was identified in the criminal cases as a victim of the alleged conspiracy. Nevertheless, GP, together with two other unindicted defendants, settled for $3 million.

The district court, in recognizing the "inherent" coerciveness which led to the settlements in M.D.L. 310, stated:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is undisputable.

(J.A. 260) Thus, Judge Singleton acknowledged what has become commonplace in antitrust class actions.[38]

The settlement scenario in M.D.L. 310 illustrates plaintiffs' unencumbered ability to manipulate one defendant at the expense of another and, in the process, to shift disproportionate exposure to those who refuse to bow to this coercion. (J.A. 150-71) Recognition of rights of contribution and claim reduction will end this undisputed reign of coercion in massive antitrust actions.[39] Contribution will permit each defendant to exercise its right to go to trial or to negotiate a fair settlement based on the merits of the case.

B. Contribution Will Promote Fair Settlements

This Court has recognized that fairness in judicial allocation of damages will generate fairness in private negotiation of settlements. In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court endorsed equitable apportionment of damages and noted that fair settlements would thereby be encouraged:

> Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements.

Id. at 408 (footnote omitted).

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[38] *See Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cases (CCH) ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Arth Main St. Drugs* v. *Beer Distribs., Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978). *See generally* Rowe, *On Fostering Fights*, N.Y. Times, Aug. 6, 1980, at A-21.

[39] *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 9 (1971).

The fact that plaintiffs are able to coerce defendants into settlement stampedes is no justification for prohibiting contribution. This Court has rejected this argument:

> For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. *Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.*

Id. (emphasis added).[40]

Under contribution and claim reduction, settlements will not be discouraged. Plaintiffs and defendants will have incentives to settle antitrust cases for amounts based on their respective assessments of the likelihood of success at trial. The certainty of outcome provided by settlement will remain attractive.

C. Final Settlements Can Be Achieved When Contribution Is Coupled With Claim Reduction

1. Claim Reduction Is Fair to All Parties

This Court can direct that contribution rights be effectuated through claim reduction in cases, such as M.D.L. 310, in which some defendants have settled. This would protect non-settling defendants' rights of contribution and settling defendants' interests in finality by treating settlements as providing plaintiffs with full satisfaction for any damages attributable to settling defendants' acts.

In *Gomes* v. *Brodhurst,* 394 F.2d 465 (3d Cir. 1968), the Third Circuit held that a settlement by one tortfeasor

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[40] *See Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246, 1249 (5th Cir. 1979); *Gomes* v. *Brodhurst,* 394 F.2d 465, 467 (3d Cir. 1968).

provides a plaintiff with full satisfaction for any damages attributable to the settling defendant's acts. The court recognized that such a result would best serve "the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.* at 467.[41]

Claim reduction not only serves the interests of all defendants, but is also fair to plaintiffs. Plaintiffs' claims are in effect reduced by the amount of damages fairly allocable to settling defendants on the theory that plaintiffs have "sold" that portion of their claims in exchange for the settlements. As Mr. Justice Brennan (then a Justice of the Supreme Court of New Jersey) recognized:

> "The problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible," . . . Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer."

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[41] *See Luke* v. *Signal Oil & Gas Co.*, 523 F.2d 1190, 1191 (5th Cir. 1975); *Doyle* v. *United States*, 441 F. Supp. 701, 710, n.5 (D.S.C. 1977); *Palestine Contractors, Inc.* v. *Perkins*, 386 S.W.2d 764, 767 (Tex. 1964).

Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954), *quoting McKenna* v. *Austin*, 134 F.2d 659 (D.C. Cir. 1943).[42]

Thus, in *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cases (CCH) ¶ 63,059 (E.D. Ark. 1979), a district court in the Eighth Circuit applied *Professional Beauty Supply* to a settlement in a price-fixing case and held that contribution required claim reduction once a settlement had been reached between plaintiffs and one of the defendants:

> A settling defendant may be liable to co-defendants for contribution unless they are released from any liability for the settling defendant's "overcharges." Therefore, if the settlement is to be approved, it must release non-settling defendants from liability for the settling defendant's actions and also release the settling defendant from any liability for contribution, in keeping with the directive in *Professional Beauty* that "the court should be able to fashion a rule of contribution which will protect the rights of the settling defendants."

¶ 63,059, at 77,252.[43] Commentators have favored effectuation of contribution rights in such a manner when there have been settlements. *Compare Contribution In Private*

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[42] *See Kassman* v. *American Univ.*, 546 F.2d 1029, 1033-34 (D.C. Cir. 1976); *Rose* v. *Associated Anesthesiologists*, 501 F.2d 806, 807-10 (D.C. Cir. 1974); *Snowden* v. *D.C. Transit Sys., Inc.*, 454 F.2d 1047, 1048-49 (D.C. Cir. 1971); *Brightheart* v. *McKay*, 420 F.2d 242, 243-44 (D.C. Cir. 1969); *Martello* v. *Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962).

[43] The court subsequently held that although claim reduction "may well be a superior method" for implementing contribution against a settling defendant, plaintiffs' agreement to indemnify the settling defendant against any contribution claims was also consistent with *Professional Beauty Supply*. *Little Rock School Dist.* v. *Borden, Inc.*, Nos. LR-76-C-41, LR-C-77-126, and LR-C-77-108 (E.D. Ark. Aug. 4, 1980).

Antitrust Actions, supra, 93 Harv. L. Rev. at 1560, *and* Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem, supra,* 32 U. Fla. L. Rev.___, *with* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J.L. & Econ.___(1980) (to be published).[44]

Claim reduction in M.D.L. 310 is fair to all parties. The record-breaking settlements were found by the district court to be fair and adequate to all class members. (J.A. 264-65, 271) Accordingly, claim reduction would (i) effectuate petitioners' rights of contribution, (ii) be fair to the class which chose to settle its claims, and (iii) bring "peace" to the settling defendants.

2. Settling Defendants Chose to Risk Contribution Liability

Even if this Court does not reach the question of claim reduction, petitioner Westvaco is nevertheless entitled to assert rights of contribution against the settling defendants.

In M.D.L. 310, Westvaco asserted cross-claims for contribution before all but two settlement agreements were even negotiated. (J.A. 74-76) Indeed, all parties were on notice of all petitioners' cross-claims for contribution and affirmative defenses of claim reduction before any settlements were approved.

The settling defendants sought to obtain protection in their various settlement agreements against contribution liability by having plaintiffs agree to exclude the settling defendants' sales from any damages thereafter sought from

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[44] A district court in the Fourth Circuit recently permitted a group of antitrust defendants to amend their pleadings to assert an affirmative defense of claim reduction in a price-fixing case. *Duplan Corp.* v. *Deering Milliken, Inc.*, No. 71-306 (D.S.C. Aug. 4, 1980).

non-settling defendants.[45] (J.A. 36, 159-60) When plaintiffs refused, each settling defendant nevertheless elected to settle in full recognition of the risk that non-settling defendants would seek contribution.[46]

All parties were aware that contribution claims would be asserted. Plaintiffs have stated:

> Upon the advice of competent counsel, settling defendants freely and knowledgeably negotiated the amounts and the terms of the settlements. They were at all times aware of the contingencies which were compromised by the settlements, including the possibility that they might one day be held liable for contribution.

Brief of Class Plaintiffs-Appellees at 68, *In re Corrugated Container Antitrust Litigation,* Nos. 80-1018 and 80-1103, *pending* (5th Cir.).[47]

All defendants knew of the cases pending in the Fifth (*Wilson Abraham*), Eighth (*Professional Beauty Supply*), and Tenth (*Olson Farms*) Circuits involving rights of con-

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[45] If a settling defendant's sales are removed from the basis of damages sought against non-settling defendants, rights of contribution are satisfied. Settlements providing such protection occurred in *In re Cement & Concrete Antitrust Litigation,* M.D.L. 296 (D. Ariz.), reported at 932 Antitrust & Trade Reg. Rep. (BNA) D-2-3 (Sept. 27, 1979) and 927 Antitrust & Trade Reg. Rep. (BNA) A-1 (Aug. 16, 1979) and in *In re Plywood Antitrust Litigation,* M.D.L. 159 (E.D. La.), reported at 859 Antitrust & Trade Reg. Rep. (BNA) A-18 (April 13, 1978).

[46] Of course, it is axiomatic that if there is a right of contribution, a non-settling defendant's right cannot be cut off by settlement agreements to which he is not a party. *See Leger* v. *Drilling Well Control, Inc.,* 592 F.2d 1246, 1249 (5th Cir. 1979); *Altman* v. *Liberty Equities Corp.,* 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972); *Palestine Contractors, Inc.* v. *Perkins,* 386 S.W.2d 764, 767 (Tex. 1964).

[47] Copies of this Brief have been filed with the Clerk of this Court.

tribution in antitrust cases. (J.A. 113) Two settling defendants have stated:

> All parties were fully aware of the general trend among courts in favor of proportionate liability among defendants. They were aware as well that the issue of proportionate liability was already under consideration by this Court in *Wilson P. Abraham Constr. Co.* v. *Texas Industries, Inc.*, No. 78-1788, and *Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346. Moreover, the issue was explicitly injected into the center ring of the present case by defendant Westvaco early in the settlement process.
>
> Finally, and most importantly, as the class plaintiffs pointed out below, the parties were "well aware" of the cases pending with respect to the issue of proportionate liability, and those settling—both plaintiffs and defendants—assumed "the risks that the rule against [proportionate liability] might change . . . ."

Brief for Appellees Weyerhaeuser Company and Willamette Industries, Inc. at 11, *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. 1979).[48]

Finally, in approving the settlements, the district court specifically found:

> The settlements were negotiated by very able and experienced lawyers, presumably familiar with the state of the law on contribution and state claims, and it is virtually inconceivable that these two contingencies were not factored in by them.

In re Corrugated Container Antitrust Litigation, 1980-1 Trade Cases (CCH) ¶ 63,163, at 77,790 (S.D. Tex. 1979).

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[48] This Brief was filed in connection with petitioners' appeals to the Fifth Circuit of the denials of their cross-claims and claim reduction defenses. Copies of this Brief have been filed with the Clerk of this Court.

Notwithstanding the record, certain settling defendants have opposed petitioners' rights of contribution by arguing that they settled in good faith. Having chosen to settle without protection against contribution, their conscious election provides no basis in law or in equity for denying petitioners their rights of contribution.

V.

Contribution Will Not Complicate Antitrust Cases

Certain lower courts have expressed concern that contribution will complicate antitrust cases. *Wilson Abraham, supra,* 604 F.2d at 905-06. As this case demonstrates, such fears are unfounded. Recognition of contribution in antitrust price-fixing cases will neither add substantive issues nor present manageability problems.

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases

Plaintiffs in a price-fixing case must prove violation, impact, and damages. *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 560 (1931). In order to recover damages in price-fixing cases such as M.D.L. 310, plaintiffs must prove sales by participants in the alleged illegal activity and the amount of damages resulting therefrom. It is precisely these issues that determine the contribution liability among defendants.[49] Accordingly, assertion of contribution will not complicate an antitrust price-fixing case.[50]

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[49] Petitioners seek contribution in M.D.L. 310 based upon defendants' respective market shares. Such data has already been developed by plaintiffs (J.A. 43) and is therefore readily available. However, other methods of determining contribution shares may be appropriate in other antitrust cases. *See, e.g., Professional Beauty Supply, supra,* 594 F.2d at 1182, n.4.

[50] Of course, if this Court should effectuate contribution by claim reduction, it would have the additional salutary effect of simplifying antitrust cases because a plaintiff need only prove the liability of non-settling defendants and does not have to prove damages attributable to settling defendants.

Opponents of contribution argue that the availability of contribution should turn on whether or not a defendant is an intentional violator. From this it is argued that contribution would procedurally complicate antitrust cases because the issue of intent would be injected into the case. *See Wilson Abraham, supra,* 604 F.2d at 905-06; *Olson Farms, supra,* ¶ 61,698, at 79,704. But a rule of contribution should be available according to the same standard of intent as is applied to determine liability to a plaintiff in the first instance. Any effort to distinguish between intentional and unintentional violators ignores the basic fairness requiring contribution and is also inconsistent with the disgorgement and deterrence objectives.[51]

B. Contribution Will Not Present Procedural Manageability Problems

At common law, contribution could only be asserted after a party had been found liable to a plaintiff and had satisfied a judgment. W. Prosser, *Law of Torts* § 50, at 309 & n.80 (4th ed. 1971). Thus, contribution did not complicate a plaintiff's case. For example, in *Olson Farms, supra,* the party (Olson Farms) seeking contribution did not assert its claims against the other companies until after they had all been found in a prior action to have been participants in an unlawful price-fixing conspiracy and Olson Farms alone had satisfied the judgment.

Petitioners' assertion of cross-claims in M.D.L. 310 offered the advantage of consolidating the antitrust and contribution claims in a single proceeding. Fed. R. Civ. P. 13 permits a defendant to state a cross-claim "against a co-party arising out of the transaction or occurrence that is the subject matter . . . of the original action." Indeed, it was the purpose of this rule to permit the

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[51] *See* pages 15-20, 22-27, *supra.*

single adjudication of claims that might otherwise have resulted in separate actions. *Southern Construction Co.* v. *Pickard,* 371 U.S. 57, 60 (1962).

Petitioners did not seek to assert contribution against any party that was not already a defendant in M.D.L. 310. It is possible in other antitrust cases that contribution from a non-party will be appropriate, and Fed. R. Civ. P. 14 provides the mechanism for asserting third-party claims.[52] But even in such instances, the district court will have the discretion under Fed. R. Civ. P. 42(b) to order separate trials with respect thereto if it perceives a risk that the antitrust action will become too complicated.

Judicial management of contribution claims in antitrust cases as a substantive or procedural matter presents analogous issues to those found in securities cases. This similarity was noted by the Eighth Circuit in *Professional Beauty Supply,* which rejected asserted manageability problems in antitrust cases and stated: "We are aware of no unmanageable administrative problems which have been caused by allowing contribution in security cases." *Professional Beauty Supply, supra,* 594 F.2d at 1185.[53]

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[52] *See, e.g., Wilson Abraham, supra,* 604 F.2d at 899; *Professional Beauty Supply, supra,* 594 F.2d at 1180-81.

[53] In considering manageability problems, Judge Singleton speculated that contribution would inhibit joint defense activities. (J.A. 261) Such concern is unfounded. Defendants will always have the primary and common objective of refuting plaintiffs' allegations and will therefore work together. Even a defendant who hopes eventually to settle will join in such efforts because of the possibility that it will be unable to settle and will have to go to trial.

There is a particular irony in the district court's concern about joint defense efforts. Plaintiffs extracted cooperation agreements from settling defendants in which various defendants agreed to make documents available, waive the attorney-client privilege, assist plaintiffs' experts, or make witnesses available for trial. (*See, e.g.,* J.A. 59-60, 124-25) Clearly, provisions of this kind in settle-

Achievement of fairness in the allocation of damages through recognition of rights of contribution in antitrust cases presents no obstacles to the administration of justice. In any event, saving judicial resources does not warrant the injustices to antitrust defendants which result from prohibiting contribution.[54]

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ment agreements have a great potential to discourage joint defense efforts, yet the court expressed no concern about their impact on such efforts.

[54] As this Court noted in *Reliable Transfer, supra,* "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." 421 U.S. at 407.

CONCLUSION

On the basis of the foregoing, petitioner Westvaco respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to grant petitioner's rights of contribution in conjunction with claim reduction.

Dated: August 28, 1980

Respectfully submitted,

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Appendices

Appendix A

To the U. S. Senate Judiciary Committee—Subcommittee on the Constitution

Senators:

My name is George Kress of Green Bay, Wisconsin. Fifty-three years ago, at the age of 23, I started a company which is today known as Green Bay Packaging Inc. Our company manufactures corrugated boxes and from its beginning has been a family-owned and managed business. This business represents my family's entire assets—in other words—"all our eggs are in this one basket". I am appearing here today to explain to you how antitrust class actions threatened the entire loss of all the work my family and I have done in the past 53 years. My recent experience involving the current antitrust situation may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging Inc. (Green Bay) has annual sales of 125 million dollars in an industry with total sales of 10 billion dollars annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6% of the total industry sales and Green Bay having 1.5% of these sales. While other much larger corporations in this industry have diversified into other related activities (accounting for their much greater net worth), Green Bay has grown almost entirely in this single business area and currently has a total net worth of approximately 70 million dollars. Green Bay employs 1780 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi and Oklahoma.

Two years ago, Green Bay and 38 others in the same industry received a request from a Federal Grand Jury

investigating antitrust price fixing conspiracy allegations. Our company responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no real concern, for Green Bay has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the other corporations and individual employees being investigated were indicted for felony or misdeameanor violations of the antitrust laws—8 corporate felony indictments, 5 corporate misdemeanor indictments, 17 individual misdemeanor indictments, 9 individual felony indictments —Green Bay was not indicted, and none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial. This was fully within our expectations for we knew Green Bay was not guilty of any antitrust violations.

Less than one year following the Justice Department investigation, our company was named as a co-defendant in more than 25 class action suits, brought against all of the 39 corporations originally investigated by the Justice Department. Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in the civil actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the

civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend by the indicted defendants was then followed by many of the unindicted defendants entering into settlement agreements with the plaintiffs in the class actions. At this time, Green Bay conducted a detailed analysis of the situation and found as follows:

1. Approximately 80% of the defendants had entered into settlement agreements with the class plaintiffs;
2. The amount contributed by the settling plaintiffs at that time totaled over 100 million dollars.
3. Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base, the percentage share of the market, times a required dollar figure. Green Bay found that the dollar figure which had been offered to the first settling defendant, $500,000 per percentage point, had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was $3,700,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment—it would go up later and it was offered "take it or leave it."
4. Settlements in civil class action suits are encouraged by the Courts.

Green Bay now realized that it faced a monumental decision . . . pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

An estimate of the potential damages which might be decided by a Court was then necessary in order that a proper assessment of the situation was possible. Using a variety of assumptions, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, a damage figure of 5% of the total industry annual sales was selected—subtracting settlements already made, and multiplying the results by 3 (because the law provided for treble damages in such cases), we concluded that we must stand ready to bear the burden of a potential legal liability of 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability. This, of course, would wipe out our entire equity and give our legitimate creditors from 1½¢ to 10¢ on their debt dollar. The attached statements are offered to illustrate the alternatives we faced. The choices available to Green Bay management became clear—and the extortion aspect of civil class action suits was indeed now understood. Our company was faced with the following choices:

1. Settle the pending class action suits by paying more than 5.5 million dollars to the plaintiffs' lawyers (and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff customers who do not wish to participate as members of the present class), *or*

2. Stand ready to continue to defend the class action suits and face the burdens of a contingent liability of over 5 billion dollars. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to even consider lending additional money to a corporation facing this severe liability. Our company's borrowing power was voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green Bay reluctantly concluded a settlement agreement with the plaintiffs in the class actions. Loss of borrowing power is a killing factor for a small privately-owned corporation involved in a capital intensive manufacturing industry where a small business must borrow in order to compete. Attorneys who are instituting class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, thus their settlement policy, once a few parties are coerced into early settlement is to "up the ante" unless the remaining parties settle reasonably soon. It has been said that settlements ignore the due process aspect of our system of justice—this would certainly seem to illustrate that point. [Attached articles omitted.]

The above cited situation has been repeated many times in the settlement process of the civil class action suits now pending in the corrugated container industry. The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Appendix B

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

Settlements Through January 1979

Settling Defendants (Listed by categories in approx. order of Settlement)	*The % of Defendants' Market*	*Approximate Dollar Amount per % point of defendant's market share*	*Amount Paid In Settlement*
FELONY INDICTEES			
1. International Paper	8.3	$1.00 million	$ 8,300,000
2. Champion International Hoerner Waldorf	5.36	$4.50 million	$24,120,000
3. Weyerhaeuser	7.83	$5.00 million	$39,150,000
4. Owens-Illinois	5.45	$6.00 million	$32,700,000
5. Olinkraft	1.225	$6.00 million	$ 7,350,000
6. Continental Group	4.22	$6.50 million	$27,430,000
MISDEMEANOR INDICTEES			
1. Boise Cascade	2.826	$3.50 million	$ 9,891,000
2. Container Corp. of America	8.56	$4.00 million	$34,240,000
3. Inland Container	7.29	$4.75 million	$34,627,500
4. St. Joe Paper	2.625	$4.75 million	$12,468,750
5. Stone Container	3.055	$4.75 million	$14,511,250
UNINDICTED			
1. St. Regis Paper	3.97	$ .43 million	$ 1,700,000
2. Union Camp	3.70	$2.00 million	$ 7,400,000
3. Diamond International	.50	$2.00 million	$ 1,000,000
4. Dura-Containers	.375	$2.00 million	$ 750,000
5. Chesapeake	1.26	$2.40 million	$ 3,024,000
6. Longview Fibre	2.58	$2.50 million	$ 6,450,000
7. Willamette Industries/ Western Kraft East/ Corco	4.18	$2.70 million	$11,286,000
8. Menasha	1.67	$2.75 million	$ 4,592,250
9. MacMillan Bloedel MacMillan Bloedel Containers	2.11	$4.00 million	$ 8,440,000
10. U.S. Corrugated-Fibre Box	.767	$4.00 million	$ 3,069,120
11. Green Bay Packaging	1.71	$3.25 million	$ 5,557,500

Supreme Court, U. S.
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SEP 24 1980
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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,
Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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No. 79-972

IN THE

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WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,
Petitioners,

VS.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

The undersigned respondents move to dismiss the writ of certiorari granted in this case on June 16, 1980,[1] on the ground that recent developments have so changed the nature of the case as to either render it moot or, at the very least, demonstrate that the writ should be dismissed as improvidently granted or otherwise inappropriate in the light of the changed circumstances.

GROUNDS FOR THE MOTION

Petitioners and defendant-respondents were named as codefendants in approximately forty treble-damage anti-

[1] Respondents' briefs are currently due to be filed on October 29, 1980. Oral argument, of course, has not yet been scheduled.

trust class actions charging them with fixing the prices of corrugated containers and sheets. Before trial, defendant-respondents settled the plaintiffs' claims for a total of approximately $300 million and were dismissed from the actions. Each of the three petitioners (who, prior to the filing of their petition for certiorari, had not settled with the plaintiffs) sought to assert cross-claims against the settling defendants for contribution in the event that the petitioners proceeded to trial and were found liable to the plaintiffs. The District Court dismissed the proposed cross-claims (J.A. 250); the Court of Appeals affirmed (J.A. 277); and this Court granted certiorari.

However, all three petitioners have now themselves entered into settlements with the plaintiffs. Those settlements, moreover, have been preliminarily approved by the District Court. In addition, as a result of their settlements, none of the three petitioners participated in the trial through the verdict. Accordingly, petitioners are now themselves settling defendants; they occupy precisely the same status as the defendant-respondents; and not one of the petitioners has a true stake in this case to obtain a ruling establishing a cause of action for contribution against settling antitrust defendants.

Petitioners Packaging Corporation of America ("PCA") and Georgia-Pacific Corporation ("Georgia-Pacific") settled prior to the class action trial, which commenced on June 9, 1980.[2] Petitioner Westvaco Corporation ("Westvaco") settled on September 3, 1980, during the course of the trial

[2] On March 20, 1980 PCA reached a settlement with the class action plaintiffs for a sum of $8 million. Georgia-Pacific, along with two other defendants (Potlatch Corporation and Fibreboard Corporation), reached a settlement for a total of $3 million on April 2, 1980. Both settlement agreements received preliminary approval on May 6, 1980 (Pretrial Order No. 50, ¶ 1).

and shortly after it filed its brief on the merits with this Court.[3] Pursuant to its settlement agreement, Westvaco is now taking steps to withdraw its petition and brief. Moreover, as shown more fully *infra* (pp. 4-5), the briefs filed by petitioners Georgia-Pacific and PCA fully concur with the respondents' position that the Court should not establish a contribution cause of action against settling antitrust defendants.

Thus, *not only has each of the three petitioners settled, but in addition none of the petitioners takes the position that settling defendants should be liable for contribution.*

In these fundamentally changed circumstances, there is no remaining "case or controversy" between the parties and the matter is therefore moot. Furthermore, even apart from "case or controversy" and mootness standards, it is now abundantly clear that the case is wholly inappropriate for review by this Court. Certiorari, we submit, would not have been granted if the case had then been in its present posture, and accordingly the writ should be dismissed in the light of these developments.

I.

NO CONTROVERSY EXISTS BETWEEN THE PETITIONERS AND THE RESPONDENTS ON WHETHER SETTLING ANTITRUST DEFENDANTS ARE SUBJECT TO CONTRIBUTION CLAIMS BY NON-SETTLING DEFENDANTS WHO ARE FOUND LIABLE TO PLAINTIFFS.

The cross-claims which were dismissed by the District Court on May 30, 1979 (J.A. 250) were asserted only against *settling defendants*. Thus, the motions filed by petitioner

[3] Westvaco entered into a settlement agreement for $975,000. The District Court gave preliminary approval to that settlement on September 16, 1980 (Pretrial Order No. 57).

Westvaco to assert cross-claims against 26 other defendants (who settled some or all of the class actions for an aggregate sum of approximately $300 million) were against "settling defendants" (J.A. 81, 129). Similarly, the PCA motion was solely against "Settling Defendants" (J.A. 224, 226, 228), and the Georgia-Pacific motion was also solely against "settling defendants" (J.A. 232, 233). And it was on the basis of those cross-claims that petitioners sought and obtained certiorari from this Court.

However, now that certiorari has been granted, none of the three petitioners takes the position that settling antitrust defendants should be subject to contribution claims. As already noted, all three have themselves settled; Westvaco is taking steps to withdraw its petition and brief in this Court; and the briefs filed by the two remaining petitioners, Georgia-Pacific and PCA, do not support contribution claims against settling antitrust defendants.

Although Georgia-Pacific and PCA urge that plaintiffs' claims against non-settling defendants should be reduced by the amount of damages allocable to the settling defendants,[4] such "claim reduction" is fundamentally different from a contribution cause of action to recover against settling defendants, and the Georgia-Pacific and PCA briefs do not support such a cause of action. Thus, in the conclusion of its brief (p. 27), Georgia-Pacific urges that contribution "rights should be enforced . . ., where settlements have occurred, by reducing the settling plaintiffs' claims by appropriate amounts to reflect the portions of such claims that are based upon sales . . . by settling defendants and *by barring contribution claims against those settling de-*

[4] See, e.g., Georgia-Pacific Br. at 22-27; PCA Br. at 5-9.

fendants." (Italics added.) PCA espouses a similar claim reduction theory.

However, the issue of claim reduction is not before this Court. The petitioners first raised the issue in the District Court when they sought leave to amend their answers to assert claim reduction as an affirmative defense. (J.A. 128, 138, 231-32, 241, 245.) These motions were denied. Although the District Court entered a final judgment pursuant to Rule 54(b), Fed.R.Civ.P., with respect to the dismissal of the cross-claims for contribution, it did not do so with respect to the affirmative defense of claim reduction. (J.A. 250-51.) The Fifth Circuit held that the "question dealing with claim reduction is not properly before us. . . . Under these circumstances we have no jurisdiction to consider this issue." (J.A. 277-78.) Not only is jurisdiction lacking over the claim reduction issue, but furthermore Georgia-Pacific and PCA lack standing to assert the issue, since their settlements eliminated any hazard they previously faced that they would be held liable at the class action trial for damages attributable to the conduct of other defendants.[5]

The patent lack of standing of either Georgia-Pacific or PCA to maintain this appeal is recognized by the petition to intervene filed on September 17, 1980 by the sole non-settling defendant, Mead Corporation. Mead's separate complaint for contribution against settling defendants was dismissed on December 21, 1979. Since the dismissal order was entered in a separate proceeding filed by Mead, the dismissal order constituted a final appealable judgment, but Mead elected not to file a notice of appeal from the dis-

[5] Nor do they have standing to assert the issue on behalf of Mead, the only defendant which tried the case through to judgment (see n. 7, *infra*). Mead, of course, is free to pursue its own claim reduction defense in its expected appeal from the jury's verdict against it.

missal order.[6] Accordingly, Mead is not a petitioner in this Court, and its petition to intervene (which shall be answered separately by the respondents) cannot breathe life into a case which is moot and likewise cannot make appropriate review which would otherwise be inappropriate. Having elected to forego (or at least indefinitely defer) any appeal from the dismissal of its contribution complaint, Mead is scarcely in a position to cure other litigants' jurisdictional and procedural defects by trying to invoke, as it were, this Court's original jurisdiction. Furthermore, to the extent that Mead seeks claim reduction with respect to the September 13 verdict against it,[7] Mead is completely free to present the claim reduction issue as part of its expected appeal from the verdict to the Fifth Circuit, and if unsuccessful there may apply to this Court for certiorari on that issue.

---

[6] Mead filed its separate complaint on May 21, 1979 in the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civil No. 4-79-245, "alleging the same rights of contribution and claim reduction sought by petitioners." (Motion to Intervene at 2.) The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310. The District Court dismissed the complaint on December 21, 1979. No notice of appeal was filed. Instead, at an as yet indeterminate date, but in any event no earlier than January 3, 1980, Mead filed a motion for reconsideration by the District Court.

[7] On September 13, 1980, at the conclusion of the class action trial, the jury returned a verdict finding Mead guilty on the price-fixing charge.

II.

THE CASE SHOULD BE DISMISSED AS MOOT OR, IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED IN THE LIGHT OF CHANGED CIRCUMSTANCES.

When the petition for certiorari in this case was filed and granted, the case was presented as one in which these three petitioners, stalwartly determined to go to trial on the antitrust claims settled by their co-defendants, sought to pursue contribution claims against the settling defendants in the event judgment should be entered against them at trial. With their settlements, however, Georgia-Pacific and PCA have made their peace and no judgment will be entered against them. As a consequence, they are themselves settling defendants and they have no basis upon which to assert a claim for contribution against other settling defendants.

"[I]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland,* 395 U.S. 784, 788 (1969). This Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964); *SEC* v. *Medical Committee for Human Rights,* 404 U.S. 403, 407 (1972). It has been long recognized that settlement generally renders a case moot. *Stewart* v. *Southern Ry.,* 315 U.S. 784 (1942); *Hammond Clock Co.* v. *Schiff,* 293 U.S. 529 (1934); Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533 at 271 (1975). In this case, any decision by the Court would not "resolve '"a real and substantial controversy admitting of specific relief through a decree of conclusive character. . . ."' " *Preiser* v.

Newkirk, 422 U.S. 395, 401 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). It would only be an "'"opinion advising what the law would be upon a hypothetical set of facts."'" *Ibid.*

The lack of any concrete "case or controversy" is further demonstrated by Georgia-Pacific's and PCA's positions on the question now before the Court. Although they sought contribution against settling defendants in their cross-claims, they no longer advocate such a cause of action and instead espouse claim reduction. But claim reduction is not before this Court, since, as the Court of Appeals held (and Georgia-Pacific and PCA do not contest in their briefs), no appealable judgment dealing with that issue had been entered by the District Court.

Thus, Georgia-Pacific and PCA agree with all respondents in opposing a contribution cause of action against settling defendants. There is no controversy. That being so, the possible relevance of the issue to other pending or future cases does not afford any justification for what would be an advisory opinion by the Court.[8]

---

[8] In its motion to intervene, Mead suggests that this case is not moot because "[t]he issue of contribution among antitrust defendants is likely to recur. . . ." (Motion to Intervene at 4.) In support of this proposition, Mead cites *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), and *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). As this Court noted in *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), these cases require that an issue be not only "capable of repetition" but also of "evading review." Mead, like petitioners, cannot show that contribution is that type of legal issue which inherently "evades review", and indeed its citation to *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, cert. pending, No. 79-1144, 48 U.S.L.W. 3570, which also deals with contribution in antitrust cases, belies any such argument. In any event, the existence or lack of other antitrust cases in which contribution has arisen has nothing to do with whether a case or controversy exists in *this* case.

Anticipating the mootness argument in its brief on the merits, PCA asserts that until "expected final approval" of its settlement occurs, it "continues to be a Defendant that has not settled." (PCA Br. at 4.) But regardless of the precise status of the settlement agreements, it is indisputable that Georgia-Pacific and PCA *do not advocate a contribution cause of action against settling defendants.* This is hardly surprising, since these settlements *reverse* petitioners' pecuniary interests; as settling defendants themselves, it would be completely irrational for them to support the imposition of contribution liability on settling defendants, and in fact they do not do so. There are therefore no adverse and antagonistic positions between the parties on the question now before this Court.

This situation is therefore wholly different from *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 465 n.3 (1978), where the Court found that a tentative settlement agreement (which had not been preliminarily approved by the District Court and which had not been reached until after the case had been fully briefed and argued in this Court and was ready for decision) did not moot the appeal. In *Coopers & Lybrand,* even apart from differences concerning the status and timing of the settlement, there was no doubt that the parties held sharply divergent positions on the question before the Court (whether a determination that an action may not be maintained as a class action is a "final decision" within the meaning of 28 U.S.C. § 1291 and therefore appealable as a matter of right). In contrast, no differences of opinion exist between the parties here on the question of whether contribution should be imposed against settling antitrust defendants.[9]

[9] In an effort to ward off dismissal for mootness, the putative intervenor Mead points to the non-class actions (or "opt-out" cases) as "cases or controversies" upon which jurisdiction may attach.

Note continued on page 10.

But even assuming petitioners could demonstrate some residual attenuated interest in this case, the Court should, in its discretion, dismiss the writ of certiorari as improvidently granted in the light of changed circumstances. For even when faced with a case not technically moot, this Court has frequently dismissed certiorari as being improvidently granted when "fuller examination of the case" has disclosed "that the record does not adequately present" the question for review. *McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971). See also, e.g., *Sanks* v. *Georgia*, 401 U.S. 144, 152 (1971); *Piccirillo* v. *New York*, 400 U.S. 548, 549 (1971).

Petitioners' settlements, coupled with their espousal of claim reduction rather than contribution in a settlement context, result in a record insufficient to present adequately the question now before the Court. *Jones* v. *State Board of Education*, 397 U.S. 31, 32 (1970); *Mitchell* v. *Oregon*

Note continued from page 9.

(See Motion to Intervene, p. 5; see also Georgia-Pacific Br. at 3, 27.) But the record is virtually non-existent on the opt-out cases and they played no role in petitioners' arguments below or the decisions below.

In both their petition for certiorari and their briefs on the merits, petitioners have argued for contribution and claim reduction in the context of the allegedly "coercive" settlement atmosphere found in antitrust class actions. Contribution in non-class action cases was not the focus of their arguments and any reliance on such cases at this time in an effort to defeat mootness would be at best a convenient afterthought. This appeal "as respects its main features" has become moot, regardless of "incidental" features such as the non-class cases. *Alejandrino* v. *Quezon*, 271 U.S. 528, 535 (1926).

Furthermore, even assuming the Georgia-Pacific cross-claims could be read as encompassing non-class action cases, there can be no question that the cross-claims were asserted only against *settling* defendants. (See J.A. 233.) And at the time of the dismissal of Georgia-Pacific's cross-claims in May 1979, *no defendant had settled any non-class action case.*

Frozen Foods Co., 361 U.S. 231 (1960). As a result of supervening events, the "focus of this lawsuit has been completely blurred, if not already obliterated," and "any judgment on the important issues involved is potentially immaterial." *Sanks* v. *Georgia, supra,* 401 U.S. at 152 (appeal dismissed; tenants objecting to constitutionality of landlord-tenant provisions voluntarily abandoned premises).

Inasmuch as Georgia-Pacific and PCA agree with respondents that a contribution cause of action should not be recognized against settling defendants and that settlements should be accorded finality, "no controversy any longer exists between the parties as to the question which impelled [the Court] to grant the writ." The Court would only be offering "advance expressions of legal judgment upon issues which remain unfocused," *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961), and which are not directly presented by the record in this case. All of these considerations, even apart from technical mootness standards, "render this case an inappropriate vehicle for this Court's first decision" on the complex issue of contribution among antitrust codefendants. *Jones* v. *State Board of Education, supra,* 397 U.S. at 32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issue raised by the District Court's dismissal of cross-claims for contribution against settling defendants is moot; that, in the alternative, supervening developments have rendered review by this Court inappropriate in the changed circumstances; and that accordingly the writ of certiorari should be dismissed.

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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, et al.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINDER OF CERTAIN RESPONDENTS IN MOTION TO DISMISS THE WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, et al.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

JOINDER OF CERTAIN RESPONDENTS IN MOTION TO DISMISS THE WRIT OF CERTIORARI

On December 20, 1979, a petition for writ of certiorari was filed before this Court in this case seeking review of the question of "[w]hether defendants in antitrust cases may assert rights of contribution." Petition [of Westvaco Corporation, Packaging Corporation of America and Georgia-Pacific Corporation] For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit, at p. 2. Petitioners sought review of this issue for two reasons. First, they asserted that a conflict of federal law existed on the issue of contribution in antitrust cases. Petition, at pp. 6-10. Second, they contended that review of the contribution issue in this case was appropriate because important issues of federal law were involved, specifically concerns that in the absence of contribution (1) "the aggregation of damage claims in large antitrust class actions may coerce settlements from defendants" and (2) "inequitable allocation of liability" may occur. Petition, at pp. 10-14. This Court granted certiorari after obtaining the views of the Solicitor General that while this case "does not necessarily present an occasion to resolve this conflict," certiorari should be granted. Brief for The United States as Amicus Curiae, filed June 2, 1980, at p. 15.

The circumstances of these cases have changed dramatically since the petitioners' and Solicitor General's briefs were submitted and since certiorari was granted. Each of the three petitioners has now settled the MDL-310 class action cases. One petitioner has withdrawn or will withdraw from this case. None of the petitioners advocates contribution in the MDL-310 class action cases. As demonstrated in the "Motion of Certain Respondents To Dismiss The Writ of Certiorari," dated September 24, 1980, this Court's precedent supports dismissal of the writ because of these changed circumstances.

For these reasons, the undersigned respondents support the "Motion of Certain Respondents to Dismiss The Writ of Certiorari."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-972

Westvaco Corporation,
Packaging Corporation of America, and
Georgia-Pacific Corporation,

Petitioners,

v.

Adams Extract Company, et al.,

Respondents.

MOTION TO DISMISS BY WESTVACO CORPORATION

Westvaco Corporation ("Westvaco"), one of the three petitioners herein moves, pursuant to Rule 53 of this Court, that the writ of certiorari issued in this cause be dismissed as to Westvaco for the reasons set forth herein.

On September 3, 1980, Westvaco entered into a settlement agreement with class plaintiffs in M.D.L. 310 after 3 1/2 months of trial before a jury. Although Westvaco was confident of its innocence, it felt compelled to settle in the absence of an established right of contribution because plaintiffs sought from Westvaco billions of dollars of damages attributable to sales by over thirty defendants who had previously settled. As a sine qua non of the settlement, plaintiffs insisted that Westvaco agree to seek the dismissal of its appeal in this Court upon preliminary approval of the settlement by the district court.

Thus, paragraph 9 of the settlement agreement provides as follows:

> 9. After preliminary approval of this Agreement, Settling Defendant agrees (i) to use its best efforts to dismiss its cause now pending in the United States Supreme Court under the style Westvaco Corp., et al. v. Adams Extract Co., et al., No. 79-972 (October Term 1980) (hereinafter referred to as the "Contribution Appeal"); (ii) to use its best efforts to cause the Contribution Appeal to be finally dismissed in its entirety, and (iii) to not take any further action with respect to the Contribution Appeal, including filing any further briefs, memoranda or other papers or appearing and arguing before the Supreme Court in support of the Contribution Appeal unless the Contribution Appeal by Settling Defendant is not dismissed.

The district court preliminarily approved the settlement after a hearing on September 16, 1980, commenting on the absence of evidence against Westvaco as follows:

> I then heard the evidence presented by Mead and it was just before Mead closed that the settlement with Westvaco was presented to the Court for the Court's consideration. I said at that time to the parties that the case against Westvaco was extremely weak; that I almost granted a motion for a directed verdict; that I thought the plaintiffs sought the settlement with Westvaco; and it was my judgment that the plaintiffs made a mistake of ever bringing Westvaco into the case.
>
> And I said those things because of what I believe to be my fiduciary duty to the class. I thought it was extremely important to the class and the presentation of the class case that Westvaco be out of the case because I felt that Westvaco being in the case to the end -- and Westvaco had not yet put on any of its evidence -- would weaken the plaintiffs' case if they in fact had a case. So I urged the settlement.
>
> The evidence presented in the case against Westvaco was really woefully weak. I believe Westvaco was probably mentioned in the trial of the case on, at the most, probably five times, maybe. . . .
>
> So I would have directed a verdict at the conclusion of Westvaco's case in its favor or, conceivably, I would have put the question to the jury about Westvaco's participation in the alleged conspiracy. And if the jury had answered "yes," I would have then seriously entertained and would probably have granted the judgment N.O.V. in favor of Westvaco.
>
> . . . .

> After the case was over and after the jury had returned its verdict, as is my custom, I discussed the case with the jury to get their ideas about whether they understood the Court's instructions and et cetera, et cetera. I always do that. And it is interesting to note that the jurors all told me that had Westvaco's name been submitted as a member of the conspiracy, they would have found Westvaco as not a member of the conspiracy.

Transcript of Proceedings, September 16, 1980 at 9-12.

Therefore, in fulfillment of its obligations under paragraph 9 of its settlement agreement with plaintiffs, as preliminarily approved by the district court, now comes Westvaco and moves, pursuant to Rule 53 of this Court, that the writ of certiorari issued by the Court in this cause on June 16, 1980, be dismissed as to Westvaco.

Westvaco has attempted without success to have its co-petitioners join in this motion.

All fees due the Clerk from Westvaco have been paid. Westvaco does not assume costs because its co-petitioners have not joined in this motion.

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IN THE

Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINDER OF WESTVACO CORPORATION IN MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

JOINDER OF WESTVACO CORPORATION IN MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

Westvaco Corporation, one of the three petitioners herein, having previously filed a Motion to Dismiss by Westvaco Corporation, dated September 25, 1980, hereby joins in the Motion of Certain Respondents to Dismiss the Writ of Certiorari, dated September 24, 1980.

Dated: October 17, 1980

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In the Supreme Court of the United States

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WESTVACO CORPORATION,
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GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF PETITIONERS GEORGIA-PACIFIC CORPORATION AND PACKAGING CORPORATION OF AMERICA TO MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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No. 79-972

In the Supreme Court of the United States

October Term, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

Response of Petitioners Georgia-Pacific Corporation and Packaging Corporation of America to Motion of Certain Respondents to Dismiss the Writ of Certiorari

Petitioners Georgia-Pacific Corporation ("Georgia-Pacific") and Packaging Corporation of America ("PCA") submit this response to the Motion of Certain Respondents to Dismiss the Writ of Certiorari, dated September 24, 1980 ("Motion"), and respectfully submit that that motion should be denied.

GROUNDS FOR DENIAL OF THE MOTION

The motion to dismiss the writ of certiorari is premised upon the sole fact that petitioners entered into settlement agreements with class action plaintiffs in this multidistrict

antitrust litigation ("M.D.L. 310") after the petition for writ of certiorari was filed with this Court.[1] Based upon this fact alone, the moving respondents ("movants") argue that the matter before this Court is moot and, simply by giving their mootness argument another name, that the writ of certiorari should be dismissed as improvidently granted in light of "changed circumstances." Movants, however, not only have mischaracterized the current status of this litigation but also have misstated the effect of petitioners' settlement agreements on this proceeding. As set forth in this response, the changes in circumstances in this litigation since the petition was filed have neither rendered the issue before this Court moot nor provided any reasons why the writ should be dismissed as improvidently granted; if anything, developments since the petition was filed confirm the need for the Court to review the decision of the Court of Appeals for the Fifth Circuit in this case.

I. Controversy Exists Between Petitioners and Respondents on the Issue Before the Court

The issue before the Court in this proceeding is whether defendants in antitrust cases may assert rights of contribution. *See* Petition for a Writ of Certiorari to the United States

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[1]Georgia-Pacific's and PCA's settlements were discussed in petitioners' opening merits briefs filed with this Court. Brief for Petitioner Georgia-Pacific Corporation ("Georgia-Pacific Br.") at 1-2, 7-11; Brief for Petitioner Packaging Corporation of America ("PCA Br.") at 3-5; Brief for Petitioner Westvaco Corporation ("Westvaco Br.") at 8-9. Westvaco Corporation ("Westvaco") entered into a settlement agreement with the class action plaintiffs after those briefs were filed as a consequence of the absence of an established right of contribution. *See* Motion to Dismiss By Westvaco Corporation ("Westvaco Motion"), filed with this Court on September 25, 1980. Westvaco's settlement agreement, unlike Georgia-Pacific's and PCA's, requires it to seek dismissal of its appeal in this proceeding. *See id.* at 2. (Copies of Georgia-Pacific's settlement agreement with the class action plaintiffs have been lodged with this Court. Copies of PCA's settlement agreement, the Pretrial Orders cited in notes 5 and 8 and the Court of Appeals brief cited in note 10 of this brief also are being provided to the Court.)

Court of Appeals for the Fifth Circuit ("Petition") at 2. As Georgia-Pacific unequivocally urged in its opening brief on the merits, this Court should require the Courts below to "apply contribution rights among defendants in all cases pending as part of M.D.L. 310." Georgia-Pacific Br. at 27. *See also* PCA Br. at 8. The Court's resolution of this issue is important not only to the future proceedings in M.D.L. 310 but also to the private enforcement of the antitrust laws generally.

In an effort to avoid having this Court address this issue, movants, before addressing the merits themselves,[2] have asserted that there is unanimity among petitioners and respondents on this issue and that the writ therefore should be dismissed. Movants thus state their conclusion that "not only has each of the three petitioners settled, but in addition none of the petitioners takes the position that settling defendants should be liable for contribution." Motion at 3. This statement, however, is neither a fair or complete account of the status of this litigation nor an accurate description of the issue or petitioners' argument before this Court or the Courts below.

A. The Contribution Issue Remains in M.D.L. 310

Contrary to movants' suggestion, petitioners' tentative settlements of the class action cases have not eliminated them as defendants in M.D.L. 310 or removed the risk of a judgment or judgments being entered against them after trial.[3] Movants virtually ignore a significant portion of

[2]Movants have requested and obtained an extension of time for filing of respondents' briefs on the merits in order to have the Court act upon their motion to dismiss before such briefing is required. On September 26, 1980, three additional defendant-respondents joined in the motion to dismiss by a separate paper that set forth no additional grounds for the motion.

[3]Georgia-Pacific and PCA have always believed this risk was remote in light of their firm belief in their innocence. In fact, Georgia-Pacific's innocence of the allegations against it in this litigation was confirmed again by the jury's recent verdict in the class action trial against The Mead

(continued)

M.D.L. 310 that has not been concluded, even tentatively, by settlement. Petitioners have been named as defendants in several cases, consolidated as part of M.D.L. 310, filed on behalf of plaintiffs who opted out of the M.D.L. 310 plaintiff class.[4] Georgia-Pacific's motion in the District Court to amend its answers to assert contribution rights by cross-claim and affirmative defense was filed not only in the M.D.L. 310 class action cases, but, as the motion makes clear, in "[a]ll actions [in M.D.L. 310] in which Georgia-Pacific Corporation has been named and served as a defendant." (J.A. 231.) Unquestionably, therefore, Georgia-Pacific's motion to amend was not, as movants imply, confined to the class action cases. Nor was the District Court's order denying petitioners' motions so limited, as the order expressly stated that it related to "all cases" in M.D.L. 310. (J.A. 250.) Hence, Georgia-Pacific's express request for leave of court to assert contribution claims and defenses in the opt-out cases pending at the time of the District Court's order was part of the matter upon which the District Court ruled. Moreover,

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Corporation ("Mead"). In that verdict, the jury found Mead liable, but Georgia-Pacific was specifically found by the jury not to have participated in the alleged conspiracy. Nevertheless, the risk, even though remote, of an adverse judgment based on sales of an entire or a substantial part of the industry remains for Georgia-Pacific and PCA in M.D.L. 310. The jury's verdict against Mead, a company that was acquitted of essentially the same charges in the trial of the companion criminal litigation, demonstrates the reality of such a risk and the inordinate pressure on defendants to settle treble damage litigation at exorbitant amounts in order to avoid that risk. As Georgia-Pacific stated in its opening brief, it is especially unfair to impose such a risk upon innocent companies, as Georgia-Pacific and PCA believe they are, that nevertheless find themselves embroiled in treble damage litigation and thereby deprive such companies of the opportunity to prove their innocence. *See also* Westvaco Motion at 1; pp. 16, 22 *infra*.

[4] *See* Georgia-Pacific Br. at 3 & n.6. These opt-out cases have been filed by substantial purchasers of corrugated containers and sheets whose purchases during the claimed damage period amount to hundreds of millions of dollars.

Georgia-Pacific has pleaded contribution cross-claims and defenses in its answers to the complaints in opt-out cases filed after the District Court's denial of its motion to amend and Georgia-Pacific and PCA intend to prosecute such claims and defenses in the opt-out cases in the event this Court, as Georgia-Pacific and PCA firmly believe it should, reverses the decision of the Court of Appeals for the Fifth Circuit.

Movants concede that Georgia-Pacific's cross-claims can "be read as encompassing" the opt-out cases in M.D.L. 310, but seek to overcome the significance of that fact by characterizing petitioners' arguments on the merits of the contribution issue as confined to class action cases and by claiming that the cross-claims sought to be asserted were only against "settling defendants" when, at the time of the District Court's order, no defendant had settled an opt-out case. Motion at 9-10 n.9. As with movants' other efforts to recolor petitioners' contentions to suit movants' ardent desire to avoid a decision on the merits of the contribution issue by this Court (*see* pp.9-13 *infra*), movants thus have focused on part, but not the whole, of petitioners' claims.

Undeniably, the class action portion of M.D.L. 310, as well as other recent antitrust class actions, stands as stark illustration of the unfairness and injustice of a denial of contribution rights in antitrust treble damage litigation and one of the kinds of abuse that will result where rights of contribution are denied. Petitioners naturally have emphasized the clear record of abuse that abounded in the M.D.L. 310 class actions, which unequivocally demonstrates the compelling need for recognition of contribution rights in antitrust cases. That is by no means to say, however, that similar abuse will not occur in the opt-out cases, the proceed-

ings in which are in large part just now getting under way.[5] Petitioners do not contend, and have never suggested, that contribution is only appropriate in class action cases, but rather have merely observed that the extreme settlement coercion resulting from the nation-wide, industry-wide damage exposure prevalent in such cases dramatically illustrates the unfairness of a denial of contribution rights. *See, e.g.*, Georgia-Pacific Br. at 5-6; Westvaco Br. at 31-34. As petitioners have pointed out, other recent non-class-action, treble damage litigation equally demonstrates the unfair and unjust consequences of a denial of contribution rights (*see* Georgia-Pacific Br. at 19-21; Westvaco Br. at 22-24) and

[5]Movants' assertion that "the record is virtually non-existent in the opt-out cases and [that] they played no role in petitioners' arguments below or the decisions below" (Motion at 10 n.9) is misleading. The time for class members initially to opt out of the M.D.L. 310 plaintiff class did not expire until October 1979, several months after the contribution issue was addressed by the District Court and while the matter was *sub judice* before the Court of Appeals. Although some separate lawsuits had been filed before that time by plaintiffs who ultimately opted out of the class, many of the opt-out cases were not filed or transferred to M.D.L. 310 until only a few months ago. A separate "track" for pretrial proceedings has been established for all opt-out cases, pursuant to which discovery is just now beginning. Thus, although opt-out cases were, as set forth above, included in the District Court's denial of petitioners' motions to amend their answers, the nascent nature of these cases at the time of the District Court's and Court of Appeals' orders explains the absence of a "record" on the consequences of a denial of contribution rights in these cases. *Indeed, it is ironic for movants to suggest that the current absence in the opt-out cases of a record of settlement coercion as in the class actions justifies dismissal of the writ while at the same time asserting that the settlements resulting from such coercion in the class cases render the contribution issue moot.* Moreover, any question regarding the District Court's approach to contribution in the opt-out cases was laid to rest when, approximately seven months after denial of petitioners' motions to amend, the District Court dismissed (without entry of judgment) contribution claims that had been filed in M.D.L. 310 after petitioners' motions were denied. As the District Court stated: "In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, ... [a]ll ... contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice." Pretrial Order No. 31, ¶ 3 (December 21, 1979).

there is no reason to believe this pattern will change in the opt-out cases in M.D.L. 310.

Moreover, movants' talismanic exhortation that Georgia-Pacific's motion sought to assert cross-claims only against "settling defendants" ignores the fact that that term was defined in the motion to include not only defendants that had already settled but also those that might "[t]hereafter" settle, as many did in the class actions and, in fact, as some have now done in the opt-out cases. (J.A. 233.)[6] Additionally, Georgia-Pacific expressly reserved the right in its motion to amend to assert contribution claims against others not included in the definition of "settling defendant" in that motion, "including defendants other than settling defendants." (J.A. 232-33.) The District Court's order and opinion denying petitioners' motions, however, unequivocally answered in the negative "[t]he question presented by these motions. . . whether, in an antitrust action such as this, contribution among defendants is proper." (J.A. 259.) The Court of Appeals' ruling on this issue was no less clear. (J.A. 278 ("The question of the right of contribution under the federal antitrust laws has been answered by another panel of our court .... It was held that there is no such right.")) Accord-

[6]Georgia-Pacific and PCA are aware of at least two defendants—both of which have joined in the motion to dismiss the writ—who reportedly have entered into settlements with M.D.L. 310 opt-out plaintiffs. Movants' assertion that "at the time of the dismissal of Georgia-Pacific's cross-claims in May 1979, no defendant had settled any non-class action case" (Motion at 10 n.9), thus is inconsequential. In fact, movants' attempt to redefine the term "settling defendant" from the clear meaning given to that term in Georgia-Pacific's motion to amend is an obvious afterthought that does not reflect their true perception of that term. For example, in a memorandum filed in the District Court by several of the defendant-respondents (including ten who have now moved to dismiss the writ of certiorari) opposing Westvaco's motion to amend its answers to assert contribution claims, the proposed claims were recognized to be "against all present *and future* settlors ...." Memorandum of Certain Settling Defendants in Support of Dismissal of Westvaco Corporation's Cross-Claim for Contribution With Prejudice at 1 (dated April 2, 1979) (emphasis supplied) (R. 254).

ingly, the focus of Georgia-Pacific's motion, and the extensive appellate proceedings that have followed and have brought petitioners to this Court, clearly is not as narrow as movants contend.[7]

Moreover, petitioners' settlement agreements with the class action plaintiffs in M.D.L. 310 are tentative at this time: despite movants' repeated conclusory statements that petitioners have "settled" and are now "settling defendants" (*see* Motion *passim*), petitioners' settlements are not to become final until the occurrence of some contingencies specified in

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[7]Not only is movants' suggestion that there was no party in the opt-out cases against which Georgia-Pacific sought to assert contribution claims factually erroneous, but their formalistic approach to this matter also disregards the procedural context in which these appellate proceedings arose and in which, until now, respondents have sought to expedite appellate proceedings on this issue. Thus, although petitioners' motions raising the contribution issue in the District Court were motions for leave of court to amend their answers to assert contribution claims and defenses, the District Court, as initially requested by certain defendant-respondents (including ten defendants who have now moved to dismiss the writ granted by this Court), denied the claims sought to be asserted so that the contribution issue could be raised immediately on appeal pursuant to entry of a Rule 54(b) final judgment. (J.A. 250-51.) These defendant-respondents requested that the District Court deny Westvaco's request that the Court delay ruling on the contribution issue until decisions were rendered on that issue in appeals then pending in the Fifth and other Circuits (J.A. 80), arguing for a prompt entry of judgment on the contribution issue (*including claim reduction*) so that prompt appellate resolution could be sought in M.D.L. 310. Memorandum of Certain Settling Defendants in Support of Dismissal of Westvaco Corporation's Cross-Claim for Contribution With Prejudice at 2-4 (dated April 2, 1979) (R. 255-57). Defendant-respondents likewise successfully moved in the Court of Appeals for expedited treatment of petitioners' appeals. Movants, who at first advocated prompt final appellate resolution of the issue, now, after more than one year of extensive appellate proceedings, ask this Court to require petitioners to start this process anew in order to raise the very same issue and to assert the very same argument now before this Court.

the agreements, none of which has yet taken place.[8] Georgia-Pacific and PCA fully believe that the plaintiff class can have no objection to the substantial settlements extracted from them and that their respective settlements ultimately will be finally approved; nevertheless, the fact remains that these settlements have not yet been finalized and may not be for a substantial period of time. Until they are, petitioners still bear the risk of possible adverse judgments in the class action cases in M.D.L. 310, and seek, as they have done throughout the appellate proceedings that have now brought them to this Court, to have appropriate contribution rules recognized to mitigate the potential consequences of that risk.

B. Movants Have Mischaracterized the Issue and Petitioners' Argument in this Case

In addition to movants' mischaracterizations of the record as set forth above, they also have sought improperly

[8] *See* Georgia-Pacific Br. at 1 & n.1; PCA Br. at 3-4. Petitioners' settlements are expressly conditioned upon obtaining final court approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, entry of judgments approving the settlements and final disposition of any appeals that may be taken from such judgments. "Preliminary approval" of these settlements by the District Court was merely a determination that the settlements are appropriate for submission to the class by notice and hearing as required by the express terms of the agreements and Rule 23(e). *See Manual for Complex Litigation* § 1.46, at 53-55 (West ed. 1977). In fact, in recognition that petitioners' settlements have not yet been finally approved, the District Court granted a severance of the class action plaintiffs' claims against Georgia-Pacific, PCA and several other defendants whose settlements have not been finally approved and stayed a trial of those claims pending final resolution of these settlements. Pretrial Order No. 52, ¶ 3 (May 28, 1980). Moreover, as movants well know, even "final approval" and entry of judgment does not necessarily ensure ultimate effectuation of class action settlements, in light of the possibility that appeals may be taken by class members or parties from the judgments approving the settlements, just as has been done in the case of all of the M.D.L. 310 class action settlements that already have been finally approved by the District Court. *Indeed, several settling defendants (including eleven of the defendants who have moved to dismiss this proceeding) have appealed from the judgments entered on their own settlements raising questions concerning possible rights of rescission.*

to narrow the issue before this Court and to describe petitioners' position on that issue in a way that, although it fits neatly into movants' dismissal arguments, misstates petitioners' argument in this Court and in the Courts below. Movants thus repeatedly espouse *their* view that petitioners do not contend that there should be a right to assert contribution against settling defendants. This is not, and has never been, petitioners' argument.

From the outset of petitioners' efforts to assert contribution rights in M.D.L. 310, petitioners have advocated implementation of those rights by cross-claim and affirmative defense based upon a rule of contribution against all co-conspirators,[9] with an integral part of that rule being a claim reduction component with reference to those co-conspirators who settle with the claimants. It has been, and continues to be, petitioners' contention that fairness and justice to all parties require the adoption of a contribution rule with claim reduction as a vital part of that rule. Such a rule of contribution would result in a fair and proportionate reduction of the plaintiff's claim to reflect that part of that claim that was sold in settlement. As petitioners consistently have stated, this rule is the proper manner in which to effectuate contribution rights and results in the fair apportionment of damages that is the heart of the contribution principle.[10] Movants' attempt to recast the relief sought by

[9]Georgia-Pacific's express reservation of rights in its motion to assert contribution claims against nonsettling defendants and others made clear its intention to pursue such claims against all who could be held liable on those claims.

[10]*See, e.g.*, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir.), Brief for Appellants at 12-19, 26-27. In its opening brief in this Court, Georgia-Pacific not only endorsed the arguments made in Westvaco's brief in support of contribution rights generally (Georgia-Pacific Br. at 4), but also set forth additional reasons why it believes recognition of contribution rights by this Court is essential for the proper private enforcement of the antitrust laws (*id.* at 5-21). *See also* PCA Br. at 4-5. In this regard, there is no basis for movants' suggestion that, as a result of Westvaco's settlement, its brief filed with this Court is to be withdrawn.

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petitioners as a rule of claim reduction *instead* of contribution (Motion at 8), therefore, is far wide of the mark. Petitioners have not advocated claim reduction in these appellate proceedings as an abstract proposition, separate and distinct from contribution; rather, petitioners consistently have argued that claim reduction should be part of the complete rule of contribution that, as other courts have recognized, not only furthers the essential premise of fairness that underlies contribution but also, equally important, removes the potential conflict between a less than complete contribution rule and the public policy of fostering settlement of litigation.[11] Thus, the very premise of claim reduction, as it has been argued by petitioners in this Court and in the Courts below and as it has been applied by courts adopting that rule, is that contribution rights of non-settling defendants *are* recognized against *all* joint wrongdoers but that, in order to achieve settlement finality, contribution claims against settling defendants are satisfied by claim reduction.

Movants argue that "the issue of claim reduction is not before this Court" (Motion at 5, 8) based on nothing more than their own self-serving conclusion that the District Court and Court of Appeals correctly severed that "issue" from the question whether contribution is available to antitrust defendants and because of the District Court's failure to enter a Rule 54(b) final judgment on the claim-reduction "issue." As already noted, however, petitioners consistently have advocated claim reduction in these proceedings as an integral part of contribution rights in this litigation.[12] Hence,

See Motion at 3, 4. Nothing in Westvaco's settlement agreement requires withdrawal of its brief (*see* Westvaco Motion at 2), and such withdrawal would be inappropriate because of other parties' incorporation of that brief into their own briefs.

[11] *See* Georgia-Pacific Br. at 22-26; PCA Br. at 5-8; Westvaco Br. at 35-38.

[12] Claim reduction, standing alone, would be appropriate in this litigation as a rule of fundamental fairness even if contribution rights, including

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Georgia-Pacific and PCA respectfully submit—as they have throughout these proceedings—that the partial settlements that have been and may be reached in this litigation do not provide a reason for rejecting the application of contribution

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claim reduction as an integral part, were not recognized in antitrust litigation. Petitioners, as well as other defendants, have urged, in the alternative to a complete contribution rule, that the District Court adopt such a rule. Nevertheless, Georgia-Pacific and PCA submit that the District Court and Court of Appeals erred in attempting to bifurcate the contribution issue, which reflects those Courts' apparent failure to appreciate the premise for application of claim reduction as an integral part of a contribution rule. Although they now seek to capitalize on such a severance of the contribution issue in their effort to avoid a decision by this Court on that issue, the respondents themselves recognized claim reduction as part of the contribution issue in the District Court. *See* Plaintiffs' Memorandum in Opposition to Westvaco Corporation's Memorandum in Support of Certain Modifications to the Proposed Settlement Agreements (filed, May 11, 1979), in which plaintiffs argued, in opposition to Westvaco's request to condition approval of the then-pending settlements on claim reduction, that Westvaco thus sought "to achieve some sort of contribution right, if not against Settling Defendants then against Plaintiffs . . . ." *Id.* at 1 (R. 383). *See also id.* at 10 (R. 392) (Westvaco seeks "contribution from plaintiffs on account of a partial settlement"); at 11 (R. 393) (claim reduction described as a "*res nova* contribution issue"); at 13 (R. 395) (reference to the "contribution rule" (*i.e.*, claim reduction) adopted by the court in *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (*see* Georgia-Pacific Br. at 23-24)).

Moreover, unlike their apparent approach in the motion to dismiss filed in this Court, none of the defendant-respondents has opposed, and indeed most have supported, claim reduction in some form in the proceedings in the Courts below. *See* Georgia-Pacific Br. at 9 n.14; J.A. 112-17. For instance, several defendant-respondents, including four of the movants, expressly requested the District Court to decide "the contribution issue . . . in a way that will protect the rights of settling defendants to the greatest extent possible." They continued:

> In *Professional Beauty Supply, Inc.*, the Eighth Circuit stated that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants." To protect settling defendants in the instant cases, these defendants respectfully submit that the Court should rule—in addition to holding that contribution is not presently permitted among co-conspirators in antitrust cases in the Fifth Circuit—that . . . the effect of the settlements in these cases is the removal from Plaintiffs' damage claims against non-settling defendants of the sales made by settling defendants over the period of the alleged conspiracy or a pro rata reduction

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rights; to the contrary, those rights can and should be accorded to defendants in all circumstances, including instances of partial settlement, to avoid the undue unfairness and injustice brought about by a contrary rule. Respondents have vigorously opposed contribution, either in whole or in part, in the proceedings in both Courts below, and there is no reason to believe they do not continue to do so now. Movants' mischaracterization of the record and their feigned "agreement" with petitioners should not lead the Court to the erroneous conclusion that the contribution issue has evaporated from M.D.L. 310.[13]

II. The Case Before the Court Is Not Moot

The contribution issue is not moot in M.D.L. 310. Simply put, movants' general statement that "[i]t has been long recognized that settlement generally renders a case moot" (Motion at 7) disregards the status of this case and the clearly divergent positions of petitioners and respondents on the contribution issue.

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of their claims based on the number of settlers. If Westvaco cannot be held liable for the sales of settling defendants then its action for contribution is moot. Such a holding would protect the integrity of the settlements and would clearly meet the fairness principle espoused in *Professional Beauty Supply, Inc.*

Brief of Certain Settling Defendants in Opposition to Motion of Westvaco to Amend Its Answer to Assert Cross-Action for Contribution at 3-4 (dated April 3, 1979) (R. 281-82). Furthermore, even assuming *arguendo* that claim reduction could be considered to be an issue separate from contribution, claim reduction nevertheless was properly before the Court of Appeals because it is so inextricably related to the broader contribution issue. *See, e.g.*, In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1096 (5th Cir. 1977); Fox v. City of West Palm Beach, 383 F.2d 189, 194 (5th Cir. 1967); Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 826 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964). Moreover, claim reduction is now before this Court because, as this Court's rules provide, the statement of issues presented to the Court "comprise[s] every subsidiary question fairly included therein." Supreme Court of the United States Rule 21.1.

[13]As certain of those who have sought leave to file a brief in this proceeding as *amici curiae* aptly observed, movants' argument that claim

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Cases involving separable or collateral controversies that remain unresolved despite a settlement are not rendered moot by the settlement. *See Bank of Marin v. England*, 385 U.S. 99 (1966). *See also Ritzau v. Warm Springs West*, 589 F.2d 1370 (9th Cir. 1979); *Church of Scientology v. United States*, 485 F.2d 313 (9th Cir. 1973).[14] As the Court stated in *Powell v. McCormack*, 395 U.S. 486 (1969): "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. But, "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 497. As in such cases, petitioners' tentative class action settlements in M.D.L. 310 do not render the issue now before the Court moot. As set forth above, the contribution issue remains fully alive in the opt-out cases; Georgia-Pacific and PCA unquestionably have a legally cognizable, economic stake in the resolution of that issue in those cases. Stated another way, the Court still can grant appropriate relief by allowing assertion of contribution rights by cross-claim and claim reduction in those cases, so that the issue clearly is not moot.[15]

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reduction is not before this Court "would have the Court evaluate a truncated rule of contribution, stripped of its claim reduction component—one which could readily be attacked for its adverse effect on settlements. But no one advocates such a rule for antitrust cases...." Brief of Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz as Amici Curiae at 15-16 (dated August 14, 1980).

[14]This principle is one of general application in cases where the mootness issue arises from events other than settlement. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Liner v. Jafco, Inc., 375 U.S. 301 (1964); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

[15]Cases may become moot when the kind of relief requested is very limited and where subsequent events effectively deprive the Court of its power to act (*see, e.g.*, Brockington v. Rhodes, 396 U.S. 41 (1969); Alejandrino v. Quezon, 271 U.S. 528 (1926)), or where a decision by the Court will have no effect on the outcome of the controversy (*see, e.g.*, DeFunis v. (continued)

Moreover, cases are not moot where they involve a continuing, underlying controversy or the possible recurrence of such an underlying controversy even though the controversy or its consequences temporarily may have ceased. *See, e.g., Division 1287, Amalgamated Ass'n of Street Ry. Employees v. Missouri*, 374 U.S. 74 (1963); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Local 74, United Brotherhood of Carpenters v. N.L.R.B.*, 341 U.S. 707 (1951).[16] The rationale for concluding that such cases are not

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Odegaard, 416 U.S. 312 (1974)). In this case, however, the Court can grant relief that will affect the outcome of the controversy because any decision by the Court will affect Georgia-Pacific's and PCA's interests in the pending opt-out cases and, possibly, in the M.D.L. 310 class actions as well. In this regard, movants' citation of *Alejandrino v. Quezon*, 271 U.S. 528 (1926) (*see* Motion at 9-10 n.9), is misleading. The Court rejected essentially the same kind of reliance upon that case in *Powell v. McCormack*. In *Powell*, the Court recognized the limited significance of *Alejandrino*, pointing out that "the reason for the dismissal in *Alejandrino* was not that Alejandrino's deprivation of salary was insufficiently substantial to prevent the case from becoming moot, but rather that his failure to plead sufficient facts to establish his mandamus claim made it impossible for any court to resolve the mandamus request." 395 U.S. at 498. As this Court stated in *Powell*, "*Alejandrino* stands only for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Id.* at 499. Here, however, issue clearly has been joined on the question of the availability of contribution rights in the opt-out cases and that issue thus has not become moot in M.D.L. 310. Georgia-Pacific and PCA certainly have a greater "personal stake" in the resolution of the issue now pending before the Court than did the petitioners in another case, not found to be moot, where the petitioners were concerned only with "some unspecified future litigation" in which their interests might be affected. Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939); *see* Deposit Guar. Nat'l Bank v. Roper, 48 U.S.L.W. 4279 (1980).

[16]Movants' suggestion that this case may be moot because the contribution issue is not one necessarily capable of "evading review" (Motion at 8 n.8) is immaterial. Where there is a "recurring controversy," the Court has not always found it necessary to address the question whether the issue raised is one that may evade review in determining if it remains a "live" issue before the Court. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* United States v. W.T. Grant Co., 345 U.S. 629 (1953).

moot is that the underlying issue remains unresolved and that, because of this lack of resolution and the continuing nature of the underlying controversy, the same issue will likely recur in the future for a party to the case. 341 U.S. at 715. Similarly, the underlying controversy over recognition of contribution rights remains unresolved in M.D.L. 310. In fact, the issue whether antitrust defendants may assert rights of contribution already has recurred in the opt-out cases in M.D.L. 310.

The concern for not sanctioning avoidance of appellate review of important issues is clearly present in this case. Thus, the Court should not allow antitrust plaintiffs to coerce defendants, fearing potentially enormous damages, into settlements, thereby avoiding full appellate review of the issue of contribution, the denial of which was the very force that enabled coercion of settlements in the first place. Westvaco's recent settlement, which triggered the motion to dismiss the writ, underscores the importance of this principle in this case. *See* Westvaco Motion at 1 ("Although Westvaco was confident of its innocence, it felt compelled to settle in the absence of an established right of contribution because plaintiffs sought from Westvaco billions of dollars of damages attributable to sales by over thirty defendants who had previously settled. As a *sine qua non* of the settlement, plaintiffs insisted that Westvaco agree to seek the dismissal of its appeal in this Court . . . .") *See also* Georgia-Pacific Br. at 7.[17]

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[17]*See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot . . . . A controversy may remain to be settled in such circumstances . . . .") (citation omitted). A dismissal for mootness leaves the party whose conduct is challenged free to commence again the contested activity. Gray v. Sanders, 372 U.S. 368, 376 (1963) ("'The voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . .

(continued)

Additionally, as this Court expressly recognized in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), settlements that remain tentative because of contingencies such as required court approval, as petitioners' settlements in this case, do not render appeals in those cases moot. *Id.* at 465 n.3. Accordingly, petitioners' potential contribution claims remain as live controversies in the M.D.L. 310 class actions until petitioners' settlements become final.[18]

[their] old ways.'") Denial of dismissal for mootness, on the other hand, ensures that appellate review of important, controversial issues is not precluded by the voluntary activity of the party wishing to avoid appellate review. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309 (1897) ("If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken.")

[18]Contrary to movants' contentions, the facts relating to the mootness question in *Coopers & Lybrand v. Livesay* were not materially different from those in this case. After a class action settlement agreement was reached in *Coopers & Lybrand*, all of the petitioners except Coopers & Lybrand agreed to dismiss the proceeding in this Court. Coopers & Lybrand, however, continued to press the issue raised in its petition and the Court did not find the issue to be moot in light of the tentative nature of the settlement, which had not yet been approved by the District Court. 437 U.S. at 465 n.3. Just as the parties in *Coopers & Lybrand* continued to have "sharply divergent positions on the question before the Court" (Motion at 9), the question of whether defendants in antitrust cases may assert rights of contribution has been hotly contested throughout the course of this litigation and continues to be contested. The fact that the settlement agreement in *Coopers & Lybrand* may not have been reached until the case had been fully briefed and argued in the Supreme Court is irrelevant, because the question of mootness, as a potential limitation on the Court's jurisdiction, can be raised and determined at any point in the litigation. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 (1978); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7-8 (1978). *See also* R. Stern & E. Gressman, *Supreme Court Practice* 885-86 (5th ed. 1978). Thus, the Court could have found *Coopers & Lybrand* to be moot, even after oral argument, had such a finding been warranted.

Each of the foregoing reasons demonstrates that the matter before the Court in this proceeding is not moot. There still remains a hotly contested issue, the resolution of which by this Court will substantially affect Georgia-Pacific's and PCA's stake in the outcome of the litigation. The requisite "case or controversy" clearly exists in order for this Court to have jurisdiction to exercise its judicial power. The Court should not dismiss the case now before it and thereby require relitigation of the same contribution issue in duplicative appellate proceedings.[19] Accordingly, the motion to dismiss should be denied.

III. The Writ Should Not Be Dismissed as Improvidently Granted

Petitioners sought review by this Court of the Court of Appeals' decision on two grounds: *first, that there is a conflict among the circuits on the question whether antitrust defendants may assert contribution rights and, second, that resolution of the contribution issue by this Court is appropriate because of the importance of that issue to the just enforcement of the federal antitrust laws. See* Petition at 6-14. Movants have not even suggested that either of these grounds somehow has disappeared since the filing of the petition or the granting of the writ.[20] In fact, the conflict among the circuits still exists and the contribution issue remains one of the most debated and widely discussed issues under the antitrust laws.

In apparent recognition of the obvious frailty of their mootness argument, movants have made the same argument

[19]Avoidance of such wasted effort and resources is a relevant consideration when mootness issues are raised. *See* Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("We would, therefore, strain the concepts of mootness if we required petitioner to start all over again....").

[20]*See, e.g.*, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) (writ of certiorari dismissed as improvidently granted where it appeared after oral argument that circuits were not in conflict).

in another guise by contending that, even if the case is not moot, the changed circumstances since filing the petition for a writ of certiorari nonetheless somehow indicate that the writ was improvidently granted. As in their mootness argument, however, movants do not confront the matters that are truly material to the issue raised by their request that the Court dismiss the writ in this case, undoubtedly because to do so compels the conclusion not that the writ should be dismissed but that this Court's review of the contribution issue in this case is now more appropriate than ever. Neither the parties' status nor the record in M.D.L. 310 has changed in such a way as to make it inappropriate for the Court to resolve this important issue in this case.

This case is not one, for example, where full examination of the record reveals that the question presented in the petition for writ of certiorari was not raised on the record below,[21] or where the question presented raises disputed questions of fact.[22] On the contrary, the issue of whether defendants in antitrust cases may assert rights of contribution has been fully presented and vigorously argued at every stage of this proceeding. Petitioners' tentative class action settlements result merely in probable elimination of some, but not all, potential contribution claims in this litigation; the question of petitioners' rights to pursue contribution claims has been raised and remains unresolved in the opt-out cases and the parties clearly diverge in their positions on how to resolve that issue.

Contrary to movants' suggestion, moreover, this case is not one in which circumstances have so changed that the issue upon which the writ of certiorari was granted no longer is presented by the record or is no longer of importance to

[21] *See, e.g.*, Bostic v. United States, 402 U.S. 547 (1971); Palmieri v. Florida, 393 U.S. 218 (1968); Smith v. Butler, 366 U.S. 161 (1961).

[22] *See, e.g.*, Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924); Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918).

the parties. The cases cited by movants are inapposite.[23] For instance, the dismissal of the writ in *Piccirillo v. New York*, 400 U.S. 548 (1971), was based on the fact that an intervening decision by the New York Court of Appeals made a decision on the fundamental constitutional question on which certiorari was granted unnecessary for a resolution of the case. Movants rely on no such change or clarification in the law or any similar change in circumstances as a reason for dismissal of the writ in this case.[24] As set forth above (*see* pp. 3-9

[23]*McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971), and *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960), were both dismissed with short, per curiam opinions that did not set forth the reasons for dismissal.

[24]Other cases cited by movants likewise do not support their motion. In *Sanks v. Georgia*, 401 U.S. 144 (1971), not only did the tenants voluntarily abandon possession of the leased premises, but the state statutory scheme under constitutional attack in that case was repealed virtually in its entirety. *Id.* at 147. The tenants argued that the case was still alive because of the possibility of a judgment against them on remand for double damages under the repealed statute. The Court pointed out the remoteness of such an occurrence and the impossibility of predicting whether its decision on the issues raised in the case before it would have any bearing on possible future litigation. *Id.* at 149-50. The decision to dismiss the writ thus was based on the difficulty of predicting whether the issues presented would ever be material in further litigation, a problem involving "purely matters of state law." *Id.* at 150.

In *Jones v. State Board of Education*, 397 U.S. 31 (1970), a student was suspended indefinitely from a state university. The Court granted certiorari to consider the issues raised by the student's claim that he had been suspended solely because he had distributed leaflets urging a boycott of fall registration. The writ was dismissed because of the conclusion, after oral argument and a closer review of the record, that the student's suspension was based in part on the finding that he lied at the hearing on the charges against him. This fact clouded the record sufficiently so as to render the case an "inappropriate vehicle" for the Court's first decision on the extent of the First Amendment restrictions upon universities' powers to suspend students. *Id.* at 32.

United States v. Fruehauf, 365 U.S. 146 (1961), involved a direct appeal to this Court from a district court under the Criminal Appeals Act, the sole question before the Court being " 'whether a loan of money comes within the . . . prohibitions' of § 302 of the Labor Management Relations

(continued)

supra), the contribution issue clearly is raised by the current record in M.D.L. 310 and that issue remains of great importance to the parties.

Moreover, it cannot seriously be suggested that subsequent events have so changed the circumstances of this case that the question presented on certiorari no longer has public significance.[25] Certiorari jurisdiction was conferred upon the Court "to decide issues, 'the settlement of which is of importance to the public as distinguished from...the parties.'" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 479 (Harlan, J., dissenting). "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). The tentative settlements in this case in no way diminish the public interest in and the far-reaching significance of the issue of contribution among antitrust defendants.

Act, 1947." *Id.* at 154. After a closer review of the record, it appeared that the Government could have pursued any one of a number of theories at trial, but that the district court's dismissal of the indictments, on the basis of a pretrial memorandum, did not clearly indicate which of the theories were foreclosed. The Court declined to decide the question presented on appeal because of the cloudy state of the record and the abstract nature of the question.

[25] *See* Triangle Improvement Council v. Ritchie, 402 U.S. 497, 499 (1971) (Harlan, J., concurring in dismissal of writ as improvidently granted) ("The fact that the statute [upon which petitioners' contentions were based] has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case, I think, a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import.") *See also* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 76-77 (1955).

Finally, the only truly material developments in this litigation since filing of the petition further reinforce the compelling need for resolution of the contribution issue by this Court in this case. On September 13, 1980, after a three-and-one-half-month class action jury trial in M.D.L. 310, the jury returned a verdict finding that Mead, the only defendant that went through a trial rather than settle with the class action plaintiffs, had participated in the alleged price-fixing conspiracy. Plaintiffs' counsel have estimated that, once judgment is entered on this verdict, Mead potentially could be liable for industry-wide damages of close to one billion dollars (after trebling) for the two-and-three-quarter-year damage period for which the jury found Mead liable. Such staggering potential liability—which could result from a denial of contribution rights to Mead, a company that was acquitted of criminal charges based on essentially the same price-fixing allegations and that accounts for less than three percent of industry sales—stands as clear proof of the manifest injustice of a denial of contribution rights.

Moreover, as already noted, the jury found in its verdict that Georgia-Pacific had not participated in the alleged conspiracy. In light of this finding, Georgia-Pacific's exorbitant settlement, paid by a company that was forced by the denial of contribution rights to sacrifice the right to prove its innocence at trial, demonstrates again the inherent unfairness of such a rule.[26] As these developments make clear, the injustices wrought by the denial of contribution rights continue to plague this litigation.

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[26]Westvaco's recent settlement for almost one million dollars similarly evidences the inordinate payments that antitrust plaintiffs, aided by a denial of contribution rights to defendants, can extract from a defendant whom, in the words of the judge who presided over the case against it, "the plaintiffs made a mistake of ever bringing . . . into the case." *See* Westvaco Motion at 2.

This case now presents the Court with perhaps the best possible record on which to resolve the contribution issue, which can be addressed in the complete context of a major antitrust litigation involving class actions, numerous opt-out cases, several settlements[27] and a potential billion-dollar judgment against one of many alleged co-conspirators, and to fashion the appropriate contribution rule in such circumstances. Consequently, all of the factual considerations pertinent to this Court's determination of a rule of contribution applicable in the full spectrum of civil antitrust litigation are presented in this case. The Court's consideration of the contribution issue in this case remains entirely appropriate, and, accordingly, the writ should not be dismissed.

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[27]As the courts frequently have observed, recognition of contribution rights necessarily requires accommodation of those rights to the principle that compromise of litigation should be fostered, and this balancing process requires the courts to "fashion a rule of contribution which will protect the rights of settling defendants . . . ." Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979); *see* Georgia-Pacific Br. at 22-26. This case provides an ideal vehicle for adoption of such a complete contribution rule.

CONCLUSION

For all of the foregoing reasons, the Motion of Certain Respondents to Dismiss the Writ of Certiorari should be denied.

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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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THE MEAD CORPORATION'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO MEAD'S MOTION TO INTERVENE AND RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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Pursuant to Rule 42.4 of the Rules of the United States Supreme Court, The Mead Corporation ("Mead"), as intervenor or *amicus curiae*, respectfully submits this reply to respondents' memorandum, filed September 26, 1980, in opposition to Mead's motion to intervene and

this response to respondents' motion, filed September 24, 1980, to dismiss the writ of certiorari in the above entitled case on the ground of mootness or, in the alternative, as improvidently granted. Mead does not believe that petitioners' appeal is moot for the reasons set forth in petitioners' response to the motion to dismiss. While Mead believes this is clear, Mead submits that granting its motion to intervene as a party petitioner will remove any possible question of alleged mootness from this appeal.

One simple fact commands attention: the variety of filings in this appeal vividly demonstrates the plethora of interests and positions on the issue of contribution that need to be resolved by this Court on this appeal. This alone provides ample justification for hearing this appeal. Moreover, all of the parties which have filed motions and briefs on this appeal implicitly recognize that Mead, as the only nonsettling defendant in the class actions of the *Corrugated Container Antitrust Litigation*, M.D.L. 310, has a substantial interest in this appeal and is directly affected by the issue of contribution on which this Court granted certiorari. Respondents are attempting to remove this appeal from this Court primarily because Mead is seeking contribution from them in this litigation. Respondents hope that this appeal will evaporate and that another appeal concerning this same issue of contribution in this litigation will not reach this Court later.

ARGUMENT

I. THIS COURT SHOULD GRANT MEAD'S MOTION TO INTERVENE AS A PARTY PETITIONER TO REMOVE ANY POSSIBLE QUESTION OF ALLEGED MOOTNESS FROM THIS APPEAL

This Court granted certiorari in M.D.L. 310 to review the issue of contribution among antitrust defendants. This issue necessarily encompasses contribution by and against settling and nonsettling defendants and claim reduction which is a mechanism to implement contribution where there have been settlements with plaintiffs by some, but not all, defendants. This Court may resolve on this appeal the full panoply of issues concerning contribution among antitrust defendants. Such resolution here would greatly aid in the administration of M.D.L. 310, where the issue of contribution continues to exist, as well as other antitrust class actions.

As the only nonsettling defendant in the M.D.L. 310 class actions, Mead unquestionably has the requisite direct stake in the outcome of this controversy to satisfy the requirements of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). There is also a concrete case or controversy, as required by Article III of the United States Constitution, between Mead and respondents concerning the issue of contribution in this litigation on which this Court granted certiorari. *See Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Bank of Marin* v. *England*, 385 U.S. 99, 100 (1966). Thus, Mead's motion to intervene as a party petitioner, filed September 17, 1980, should be granted to remove any possible question raised by respondents that this appeal is moot.

Mead has always had a vital and legitimate interest in the appeal before this Court. Mead filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton*

Box Board Co., Civil No. 4-79-245, alleging the same rights of contribution sought here by the petitioners. Mead claimed contribution against settling and non-settling defendants.[1] The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). While the district court on December 21, 1979 filed an opinion dismissing Mead's claims for contribution, no final judgment has ever been entered dismissing Mead's complaint, as required by either Rule 58 or Rule 54(b) of the Federal Rules of Civil Procedure. On January 3, 1980, Mead filed a motion for reconsideration and on January 21, 1980 plaintiffs filed their objections to the motion. Respondents concede that the district court has never ruled on that motion. But for the absence of the entry of a final judgment, Mead would have filed a notice of appeal and would also be a petitioner on the appeal before this Court.[2]

Respondents' sole argument against permitting Mead to intervene before this Court is that "Mead could have

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[1] Mead's complaint for contribution was filed in the class actions as well as in the individual opt-out cases filed by plaintiffs in M.D.L. 310.

[2] Erroneously and without basis, respondents state that the pretrial order constituted a "final appealable judgment" and that Mead "elected to forego . . . any appeal from the dismissal of its contribution complaint" (Motion of Respondents at 5-6). The paragraph of the district court's pretrial order which dismissed Mead's contribution claim was not a "judgment." Rule 58 of the Federal Rules of Civil Procedure requires that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See United States* v. *Indrelunas*, 411 U.S. 216 (1973). Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that "[a] judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Since no separate judgment has ever been entered dismissing Mead's complaint for contribution, the time for filing a notice of appeal which commences upon the "entry of judgment" has not yet begun to run under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

petitioned for intervention" in the court of appeals (Memorandum of Respondents at 7). Since Mead's interests were similar to those of appellants, the proper procedure to protect Mead's interests, at that time, was to participate in those proceedings as *amicus curiae*, which Mead did, because a defendant is entitled to the benefit of an appeal taken by co-defendants. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980). Mead's participation in the court of appeals as *amicus curiae* was based upon proper procedure, since the district court had failed to enter a final judgment from which Mead could have taken a separate appeal at that time.

Mead followed the same procedure in this Court by first filing a motion and brief as *amicus curiae*. Mead moved to intervene as a party petitioner only after Westvaco Corporation ("Westvaco") settled the class action cases (just 33 days ago on September 3, 1980) and "agreed" (or was coerced) as a condition of that settlement to attempt to withdraw this appeal. Prior to this, the circumstances did not warrant intervention on Mead's part since respondents did not then contend that the appeal was moot. The use of proper procedure by Mead should not provide a basis now for penalizing Mead for intervening circumstances beyond its control. Given the fact that the district court decided the issue of contribution and entered a final judgment as to petitioners and the court of appeals affirmed the district court's decision, it makes no sense to dismiss petitioners' appeal in this Court and wait for the issue to be briefed again in the same case by Mead in the court of appeals and then for Mead to petition this Court again for review at that time. This is especially so since all must concede that Mead is directly affected by the contribution issue in M.D.L. 310.

This Court has previously permitted a nonparty to proceedings below, whose rights are affected by that judg-

ment, to intervene by motion after certiorari has been granted where justice demands that intervention be permitted. Thus, in *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), this Court allowed a union, which had not participated in the judicial review proceedings below, to intervene as a party and file a brief to support its interests in the labor controversy. In *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 198-99 n.5 (1944), a motion by a trade association to intervene was granted by this Court even though the intervenor had not participated in the prior proceedings before the three-judge district court. Furthermore, this Court in *United States* v. *Terminal Railroad Association*, 236 U.S. 194 (1915), permitted intervention in appeals pending before this Court in order "to ask a modification of the decree" to the extent that it was prejudicial to the interests of the intervenors. *Id.* at 199. Although the intervening parties in *Terminal Railroad* had been denied leave to intervene in the court below, they did not seek review from that denial of intervention. *Id.* at 198. Instead, they filed original motions to intervene in the proceedings pending before this Court, which were granted, and were allowed to file briefs and to participate in oral argument. *Id.* at 199. This Court held:

> [A]lthough the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights. *Id.* at 199.

In *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952), this Court granted a motion to intervene which added two new parties as plaintiffs-respondents after the merits of the controversy were before this Court. Defendants-petitioners questioned for the first time the standing of the original respondents to maintain the action and intervention was permitted explicitly to "remove the matter from controversy." *Id.* at 416.

A nonparty has even been permitted to intervene in this Court for the sole purpose of filing a petition for certiorari where its interests had been adequately represented below, but the losing party failed to prosecute an appeal in this Court. *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968); *see also Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969).

Moreover, in a civil class action, *Rogers* v. *Paul*, 382 U.S. 198, 199 (1965), this Court granted a motion for intervention to add two putative class members as petitioners to avoid potential mootness that could have resulted from the removal of the original petitioners from the class.[3]

Thus, Mead's motion to intervene as a party petitioner should be granted to remove any possible question of alleged mootness from this appeal. Plaintiffs' purpose in seeking dismissal of this appeal and opposing Mead's motion to intervene is to continue to use the club of a "no contribution rule" in both the class actions and the opt-out cases in M.D.L. 310 to further their coercive settlement tactics. In the class actions, Mead has approximately 2½ percent of the industry sales of corrugated containers, but plaintiffs continue to seek to hold Mead liable for industry-wide sales to class members. This "legalized blackmail" can be prevented by permitting contribution.[4] The granting of Mead's motion to inter-

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[3] Respondents concede that intervention was permitted in *Rogers*, *Mullaney*, *Banks*, and *Eastern-Central Motor Carriers Ass'n* even though "the intervenors were not parties to the proceedings below" (Memorandum of Respondents at 7), but do not admit that nonparties intervened in *Terminal Railroad* and *Acme* despite the fact that this Court in *Terminal Railroad* stated that "the petitioners were not parties" (*id.* at 199) and that in *Acme* the intervenor was not a party to the proceedings in the court of appeals (351 F.2d 258).

[4] *Consider Kline* v. *Coldwell, Banker & Co.*, 503 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974).

vene would bring before this Court a nonsettling defendant in the class actions in M.D.L. 310 which is most directly affected by the issue of contribution on which this Court granted certiorari.

II. THE QUESTION PRESENTED FOR REVIEW IS NOT MOOT

In any event, the issue of rights of contribution among antitrust defendants is not moot with respect to petitioners. M.D.L. 310, from which this appeal arose, presents all the permutations encompassed within this Court's writ of certiorari. The issue of contribution is real and continues and should now be decided by this Court. The split among the federal courts of appeals on this issue persists and can only be resolved by this Court. Respondents' invitation to sidestep this fundamental issue should be declined. The interests of justice as well as the limited resources of the federal judiciary would best be served by this Court's retention of jurisdiction to decide this appeal. It would be a needless waste of time to dismiss this writ only to grant another immediately on the identical issue or to await the inevitable relitigation of the same issue in M.D.L. 310 through each level of the federal court system.[5]

Respondents contend that the controversy on this appeal is moot because petitioners' cross claims "were asserted only against *settling defendants*" (Motion of Respondents at 3) (emphasis in original).[6] This contention

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[5] In addition to the arguments herein, Mead adopts and incorporates by reference the arguments set forth in the response filed by petitioners in opposition to respondents' motion to dismiss.

[6] Respondents' fragmentation of the question presented for review, if accepted, would sanction needless piecemeal litigation, a situation repeatedly condemned by this Court. *See Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927); *United States* v. *Continental & Oregon Land Co.*, 192 U.S. 355 (1904); *Stark* v. *Starr*, 94 U.S. 477 (1877); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877).

lacks merit. The question presented for review on which this Court granted certiorari was "[w]hether defendants in antitrust cases may assert rights of contribution" (Petition for Certiorari at 2). The grant of certiorari was not limited to the issue of whether contribution could be asserted against settling defendants. There continues to be a case or controversy in M.D.L. 310 on the issue of contribution among antitrust defendants which is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937).

Despite a recognition by some courts that claim reduction is a way to implement contribution against a settling defendant,[7] respondents assert that " 'claim reduction' is fundamentally different" from contribution against settling defendants and is not properly before this Court (Motion of Respondents at 4). This contention poignantly reveals a basic misconception on the part of respondents. Claim reduction is not different from contribution; it is a mechanism which implements the right of contribution where there have been settlements by some, but not all, defendants.

The question of contribution among antitrust defendants is likely to recur and is of widespread public importance to the fair and equitable administration of antitrust class actions. The contribution issue continues to exist in M.D.L. 310. The cases brought by plaintiffs which opted out of the class actions are pending in M.D.L. 310 and raise the identical claims of contribution and claim reduction. Furthermore, respondents admit that "Mead is completely free to present the claim reduction issue as part of its expected appeal from the verdict to the Fifth Circuit, and if unsuccessful there may apply

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[7] *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954).

to this Court for certiorari on that issue" (Motion of Respondents at 6). The likelihood of recurrence, "together with a public interest in having the [issue of contribution] settled, militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). *See also Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968); *Southern Pacific Co.* v. *ICC*, 219 U.S. 498, 515 (1911).[8]

It is not necessary for the issue of contribution, which is likely to recur, to also evade review in order to be justiciable. This Court may continue to exercise its jurisdiction so long as " 'there is [any] reasonable expectation that the wrong will be repeated.' " *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).[9]

In *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), this Court accepted jurisdiction to rule upon "a question of broad public interest, which was likely to recur," but which did not evade review. *Id.* at 34. In *Ramirez*, three ex-felons challenged a state's election law which denied them the right to vote because of their criminal records. In rejecting arguments to dismiss for mootness, this Court did not rely on the possibility that the issue would evade review, suggesting that such involved "purely practical considerations" which would not control the moot-

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[8] In *Southern Pacific*, this Court stated that "[t]he questions involved in the orders . . . are usually continuing" and that its jurisdiction "ought not to be, as [it] might be, defeated, by [issues] capable of repetition . . . ." 219 U.S. at 515.

[9] In *W. T. Grant*, the Government sought to enjoin an individual from serving on the boards of directors of several competing corporations. Notwithstanding that the issue on appeal would not evade review in the future, this Court held that defendant's resignations from those boards did not moot the appeal as he could at any time resume his directorships and necessitate relitigation of the identical issues. Furthermore, this Court decided to reach the merits, in part, because of the "public interest in having the legality of the practices settled" under the antitrust laws. 345 U.S. at 632.

ness issue. *Id.* at 36. Instead, this Court accepted jurisdiction based on the fact that a "continuing controversy" existed between ex-felons and election officials, notwithstanding that plaintiffs no longer had any legal dispute with defendants. *Id.* at 40.[10]

Respondents argue, in the alternative, that the writ of certiorari should be dismissed as improvidently granted "in the light of changed circumstances" even if this appeal is not "technically moot" (Motion of Respondents at 10). A motion to dismiss a writ of certiorari as improvidently granted should be granted "only in exceptional circumstances." *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228, 232 (1972). The only fact that has changed here since the writ was granted is that Westvaco entered into a settlement agreement with plaintiffs in the class action cases. That settlement has not been finally approved. Indeed, notice to the class has not even been sent concerning either Westvaco's settlement or those of the other petitioners. Thus, the class has not yet had its opportunity to object to the settlements. There are no "changed circumstances" with respect to Georgia-Pacific Corporation or Packaging Corporation of America. Westvaco's tentative settlement with plaintiffs has not blurred the issue of contribution. The record on this appeal is more than sufficient to present adequately the question for review.[11] If any litigation presented an appropriate vehicle for this Court's resolution of the issue of contribution among antitrust defendants, M.D.L. 310 is just such a case.

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[10] Significantly, *Ramirez* was decided *after Roe* v. *Wade*, 410 U.S. 113 (1973), which respondents cite for the proposition that to avert mootness an issue which is likely to recur must also evade review.

[11] Westvaco filed its brief on the merits of this appeal prior to its settlement. In addition, the briefs of the other petitioners have been filed as well as those of numerous *amici curiae*. The briefs of respondents are due shortly.

CONCLUSION

For the foregoing reasons, Mead's motion for leave to intervene as a party petitioner should be granted to remove any possible question of alleged mootness from this appeal and respondents' motion to dismiss the writ of certiorari should be denied because the issue of contribution in M.D.L. 310 is not moot.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA and GEORGIA-PACIFIC CORPORATION

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT WILLAMETTE INDUSTRIES, INC. IN OPPOSITION TO MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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IN THE

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Respondents.

BRIEF OF RESPONDENT WILLAMETTE INDUSTRIES, INC. IN OPPOSITION TO MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

The motion of certain defendant-respondents, in league with plaintiff-respondents, to dismiss the writ of certiorari granted in this case fails to identify any change in the posture of this case which warrants dismissal. Although one petitioner, Westvaco Corporation, has moved to dismiss its petition, Georgia-Pacific Corporation ("G-P") and Packaging Corporation of America ("PCA"), the other two petitioners, are determined to pursue the case. Because opt-out actions are still pending, and because settlements by PCA and G-P with the class action plaintiffs have not been finally approved, this appeal is not moot.

Further, The Mead Corporation ("Mead") has filed and intends to press a claim for contribution against Willamette and other defendants. In view of the recent verdict against Mead, which plaintiffs estimate may result in a billion-dollar judgment,* the issue of proportionate liability in this litigation is more alive, more sharply defined and more pressing than ever before. As a technical and practical matter, the case is neither moot nor otherwise inappropriate for consideration at this time.

Movants' effort to dismiss the writ is a tacit recognition that this Court's decision may have a direct impact on all parties. The pendency of the opt-out cases (which Willamette has not settled), the possibility that settlements with the class may be vacated on appeal, the contribution claim by Mead, and the indisputable conflict in the circuits all give Willamette a vital interest in the Court's consideration of the proportionate liability issue in this case. The demonstrated consequence of the present uncertainty about proportionate liability is that defendants are coerced to settle for substantial sums wholly unsupported by the merits of the claims against them.**

As a settling defendant which the jury in the trial against Mead found innocent of conspiracy,*** Willamette has first-hand knowledge of the inequity which pervaded the settlement process. Failure to review petitioners' claims now leaves Willamette subject to a repetition of this coercion in the opt-out cases, and leaves open the possibility of facing it again in the class action if petitioners' pending settlements

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*The Houston Post, September 14, 1980, p. 1.

**The most recent illustration of this is the settlement by Westvaco Corporation for nearly $1 million. Both Judge Singleton and the jury stated they would have found Westvaco innocent had it not settled. "Motion to Dismiss By Westvaco Corporation," at 2-3. Nevertheless, Westvaco "felt compelled to settle in the absence of an established right to contribution . . ." *Id.* at 1.

***The form of special verdict submitted to the jury in the Mead trial required the jury to state which of thirty-three original defendants participated in the conspiracy. The jury found that Willamette was not a member of the conspiracy.

are not approved or if settlements are vacated on appeal. The contribution claim by Mead, and possible contribution claims by other defendants in the event their settlements are reversed by the Fifth Circuit, enhances Willamette's concern that this Court address now the issue of proportionate liability.

Further, the clear split of authority in the circuits encourages forum-shopping, and has contributed to the uncertainty in the law. There is no reason to put off any longer a resolution of that uncertainty. Respondent Willamette Industries, Inc. therefore urges that the motion to dismiss be denied, or, at a minimum, deferred to consideration of the merits.

1. PETITIONERS' RECENT SETTLEMENTS DO NOT MOOT THIS APPEAL.

Clearly, petitioners' tentative settlements in the class action cases do not moot proportionate liability claims in the opt-out cases.* Like the class action, those cases involve billions of dollars in sales and enormous damage claims. With respect to the opt-out cases, petitioners—and Willamette as well—remain nonsettlors who would benefit from a rule of proportionate liability.

Movants attempt to bury this dispositive fact in a footnote (Motion at 9-10 n.9.), and take the position that the opt-out cases are moot because the record on them is "virtually nonexistent" and because the question of proportionate liability in those cases did not play a prominent role in the arguments and decisions below. (*Id.*) This contention is both novel and nonsense. First, the claims in the opt-out cases are identical to those in the class action, and all discovery in the class case

*Those cases are properly before the Court. G-P's motion to assert claims for contribution and claim-reduction on its face applies to all actions, including the opt-out cases. (J.A. 231). At the time of the motion, G-P had already filed answers in four opt-out cases and had been named and served in several others, and the motion clearly covered those opt-out cases. Pretrial Order No. 13 is captioned "all cases" and denied petitioners' contribution claims and claim-reduction defenses in the opt-out cases as well as the class action portion of M.D.L. 310.

applies to the opt-out actions. The proportionate liability issue there is precisely the same as in the class action case. Second, a live controversy does not become moot simply because some aspects of the record on appeal are more fully developed than others.

Even if the opt-out actions were not before the Court, the case would still present a justiciable issue. An appeal is not moot if the petitioner's attempt to resolve its dispute with respondents remains subject to unresolved contingencies. Here, petitioners' settlement agreements with the class action plaintiffs have not received final approval. Indeed, plaintiff-respondents have never even sought final approval of those settlements. Further, all of the settlements entered into by respondents have been challenged on appeal, and petitioners' settlements, if ever finally approved, may also be subjected to appellate review. In this uncertain posture, petitioners' asserted right to contribution and claim reduction against Willamette is decidedly not moot. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 465 n.3 (1978).

The uncertain posture of petitioners' settlements brings this case squarely within the standard established in *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). There, Stubbs had been sentenced under New York's multiple offender statute on the basis of a prior conviction in Tennessee. On Stubbs' appeal from the denial of a writ of habeas corpus, the Second Circuit Court of Appeals held that the Tennessee conviction was constitutionally infirm and could not be used as a basis for his sentence. The State appealed to this Court. In the meantime, Stubbs was resentenced to the same term on the basis of a Texas conviction then on appeal in the Texas state courts. This Court held that the State's appeal was not moot because it had a continuing interest in the availability of the Tennessee conviction "until it can be said with certainty" that the new sentence, based on the Texas conviction, was valid. 408 U.S. at 206.

G-P and PCA similarly have a live, justiciable interest in contribution and claim reduction "until it can be said with certainty" that their settlements are final. G-P and PCA

sharply disagree both with plaintiffs and with the moving defendants on the fundamental question of whether a rule of proportionate liability applies in this case, and so long as the possibility remains that petitioners' settlements may not receive final approval, or that petitioners' or any other defendant's settlements may be upset on appeal, there is an "existing dispute [between the parties which] makes this a live controversy." *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397, 403 n.8 (1976).

2. The Claim Reduction Issue is Unquestionably Before the Court.

The second prong of movants' argument contends that claim reduction is not before the Court because the Fifth Circuit did not address the issue. The fallacy in that reasoning is that the Fifth Circuit rejected *any* rule of proportionate liability and accordingly had no cause to consider claim reduction. The issue is and always has been, however, an integral part of petitioners' contribution claim. The simple fact that claim reduction may also arise in a different procedural context (*i.e.,* as an affirmative defense) does not cause it to disappear as an issue properly and necessarily before the Court.

Contribution and claim reduction are corollary elements of a unified rule of proportionate liability. To separate them out as distinct issues to be considered in different cases is to ignore both petitioners' claims and the realities of this case. Where, as here, the issue of proportionate liability arises in the context of settlements, a coherent and comprehensive analysis of contribution cannot be done without consideration of claim reduction.

3. Recent Developments Have Crystalized the Issues, and Make a Decision in This Case Even More Appropriate.

Just as movants' technical argument is deficient, their suggestion that the case is otherwise inappropriate for review ignores practical reality. The jury verdict against Mead, which may result in "one of the largest [judgments] in

American legal history,"* brings a sense of urgency and immediacy to this case which none of movants' rhetoric can conceal. The verdict against Mead and petitioners' tentative settlements do not, as movants argue, blur or obliterate the focus of the suit or render this Court's judgment "potentially immaterial." (Motion at 11.) On the contrary, the recent events have heightened movants' concern that a decision in this case will have a very material impact. It is precisely because the case is not moot, and because this Court's decision may have a direct and substantial impact on movants' pecuniary interests, that they now seek to have the writ dismissed.

Such a transparent attempt to avoid a decision where the issues are so sharply drawn should not be countenanced. Delay in deciding the issues of contribution and claim-reduction in antitrust cases will only perpetuate and deepen the conflict among the circuits and will lead to further forum-shopping and other tactical maneuvering by parties seeking to exploit the conflict. Further, the Court has decided to consider one aspect of the contribution issue in *Northwest Airlines, Inc.* v. *Transport Workers Union,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 3813 (June 16, 1980) (No. 79-1056). Certiorari was granted in this case and it was set for argument in tandem with *Northwest Airlines* because together these cases present the broad spectrum of considerations necessary for the Court to decide the issues associated with proportionate liability in a meaningful, comprehensive fashion. Recent events have not undercut that rationale in any way. The conflict in the circuits must be resolved, and dismissal of this case will not obviate the necessity of addressing the issues it raises.

CONCLUSION

The inequity in holding a single company liable for damages attributable to an entire industry is graphically illustrated in this case, and movants' litany of citations cannot overcome the fact that the parties before the court

*"The Houston Post," September 14, 1980, p. 1, 27A.

have substantial, adverse and live interests at stake, and disagree sharply on the substantive legal issues which that inequity raises and which this Court must resolve. Under such circumstances, the case satisfies the justiciability requirements of Article III of the Constitution. The decision to hear this case was a sound one, and recent developments have simply reinforced the propriety of that decision. Accordingly, the motion to dismiss should be denied.

DATED: October 6, 1980

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IN THE
Supreme Court of the United States
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WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONERS WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA AND GEORGIA-PACIFIC CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

The Mead Corporation ("Mead"), through undersigned counsel and pursuant to Rule 36 of the Rules of the United States Supreme Court, moves the Court for permission to file a brief amicus curiae in *Westvaco Corporation, et al.* v. *Adams Extract Company, et al.*, No. 79-972. Grounds for this motion are:

1. This Court has granted the petition for certiorari of Westvaco Corporation ("Westvaco"), Packaging Cor-

poration of America ("Packaging Corporation"), and Georgia-Pacific Corporation ("Georgia-Pacific"), defendants in the *Corrugated Container Antitrust Litigation*, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution and claim reduction in antitrust cases. Mead is also a defendant in this litigation. Indeed, Mead and Westvaco are the only two defendants in M.D.L. 310 which did not settle the class action cases, which are currently in trial, and are most directly affected by the contribution issue.

2. On December 7, 1978, Westvaco moved for leave to amend its answer to the complaint in M.D.L. 310 to assert cross-claims for contribution. On March 1, 1979, Westvaco filed an amended motion to assert cross-claims for contribution and an affirmative defense of claim reduction. Packaging Corporation and Georgia-Pacific filed similar motions. On May 16, 1979, the district court denied the motions. On October 30, 1979, the Court of Appeals for the Fifth Circuit summarily affirmed the district court's denial of the motions for contribution and dismissed the appeals with respect to claim reduction. The court, without analysis, accepted as controlling authority its recent decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. pending sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980), in which the Fifth Circuit held that there were no rights of contribution for antitrust defendants.

3. While petitioners filed motions to assert contribution by way of cross-claims and to assert claim reduction by way of an affirmative defense in the district court below, Mead filed a separate complaint on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civ. No. 4-79-245, alleging the same rights of contribution and claim reduction sought by petitioners. The Judicial Panel on

Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). Subsequently, plaintiffs filed a motion to dismiss which the district court granted on December 21, 1979. Thereafter, on January 2, 1980, Mead filed a motion for reconsideration, but the district court has never ruled on that motion. Accordingly, no final appealable order was entered by the district court from which Mead could appeal. But for the absence of a final appealable order, Mead would also be a petitioner on this appeal before this Court.

4. Because Mead's interests in the contribution issue pending before this Court are identical to petitioners', Mead is entitled to the benefit of this appeal. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980).

5. Thus, Mead has a legitimate and vital interest in the appeal before this Court. *The Employers' Liability Cases*, 207 U.S. 463 (1908); *Northern Securities Co.* v. *United States*, 191 U.S. 555 (1903); *The Grey Jacket*, 72 U.S. 370 (1866); *Florida* v. *Georgia*, 58 U.S. 478 (1855). *See also Strasser* v. *Doorley*, 432 F.2d 567 (1st Cir. 1970).

6. Mead believes the arguments to be presented on its behalf to this Court are material and germane to consideration of this important issue under the federal antitrust laws, and to the right of Mead to contribution and claim reduction under those laws, and respectfully submits that its arguments should be presented to and considered by this Court.

7. Mead has been unable to obtain the consent of all parties involved in *Westvaco Corporation, et al.* v. *Adams Extract Company, et al.* to the filing of an amicus curiae brief, thus necessitating this motion.

For the reasons stated above, The Mead Corporation moves the Court for permission to file a brief amicus curiae in this matter.

Respectfully submitted,

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The Mead Corporation

August 29, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, AND
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Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONERS WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA AND GEORGIA-PACIFIC CORPORATION

The Mead Corporation ("Mead") submits this brief as amicus curiae in support of petitioners Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation"), and Georgia-Pacific Corpo-

ration ("Georgia-Pacific"). Mead respectfully submits that this Court should hold that defendants may assert rights of contribution and claim reduction in antitrust cases.

INTEREST OF AMICUS CURIAE

Mead is one of 37 corrugated container manufacturers named as defendants in one or more of over 60 treble damage antitrust class and nonclass actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). Mead is one of two nonsettling defendants in the class actions of M.D.L. 310 and, along with Westvaco, is currently in the trial of the class actions in that multidistrict action.

On September 6, 1978, the district court, purportedly under Rule 23 of the Federal Rules of Civil Procedure, certified a national class of all purchasers of corrugated containers or corrugated sheets from defendants from January 1, 1960 to January 25, 1978, estimated to include 300,000 members. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

Thereafter, and as a direct result of that class certification, plaintiffs engaged in an unprecedented five-week settlement "stampede" from late December 1978 to January 1979, which resulted in 24 defendants collectively paying more than $288 million in 22 separate settlements. With each successive settlement, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. Plaintiffs were able to escalate their settlement demands by refusing to remove the sales of settling defendants from the litigation. As a result, plaintiffs threatened each remaining nonsettling defendant with exposure to damage claims based upon the sales of each settling defendant.

Without rights of contribution or claim reduction, plaintiffs claim that Mead and Westvaco, each having approximately 2½% of the market, nevertheless face potential damage claims in M.D.L. 310 based upon industry-wide sales.

Mead has the identical interest in the outcome of this appeal as petitioners. The only reason Mead is not a petitioner in this matter is because the district court below has never entered a final appealable order dismissing its separate complaint for contribution and claim reduction. It is well established that a non-appealing defendant may benefit from an appeal taken by other defendants. *Moitie* v. *Federated Department Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980).

SUMMARY OF ARGUMENT

M.D.L. 310 not only represents one of the largest antitrust cases in history, but also represents the most egregious abuse of the class action device to date. The absence of rights of contribution and claim reduction among antitrust defendants has resulted in coercive escalation settlement tactics by plaintiffs and a blatant perversion of Rule 23 of the Federal Rules of Civil Procedure. The escalation settlements extracted by plaintiffs in this case conclusively demonstrate the fundamental necessity for rights of contribution and claim reduction in antitrust cases. In the absence of such rights, an innocent defendant is relegated to the unacceptable choice of trying a lawsuit with potential multibillion dollar damage exposure or agreeing to an extortionate settlement on a take it or leave it basis.

Rights of contribution and claim reduction among antitrust defendants will (1) eliminate the manifest unfairness of coercive escalation settlements to nonsettling defendants, (2) prevent the most culpable defendants

from escaping significant liability through "sweetheart" settlements, and (3) increase the deterrence of the antitrust laws. Recognition of rights of contribution and claim reduction among antitrust defendants would proportion liability and ultimately damages to relative culpability, market size and other legitimate factors. The settlement process would not be exploited by coercion, and settling and nonsettling defendants alike would not be victimized by the happenstance of a successive escalation settlement timetable bearing no relationship to any individual defendant's culpability. The confluence of joint and several liability, class certification, and treble damages compels that rights of contribution and claim reduction be recognized in antitrust cases.

ARGUMENT

I. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH HAS OCCURRED IN THIS CASE

Although settlements in antitrust cases have been historically favored, plaintiffs' settlement tactics in this case have completely perverted the settlement process and have "upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 459 (2d Cir. 1974). Recognition of contribution and claim reduction among antitrust defendants would not only eliminate settlement coercion, but would also restore the delicate settlement balance which has been destroyed by plaintiffs in this case. Furthermore, the availability of contribution would prevent the negotiation of "sweetheart" settlements in which more culpable defendants

settle early and cheaply to the detriment of the remaining firms.[1]

A. The Settlement History

Plaintiffs negotiated the settlements in this case based on market share or "points." Points equal an individual defendant's percentage of all defendants' sales of corrugated containers and sheets.[2] Plaintiffs classified defendant corporations into three groups—felony indictees, misdemeanor indictees, and unindicted corporations—and negotiated successive settlements with each corporation in each group, as illustrated in the following table.[3]

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[1] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 72 (1979) (statement of Robert P. Taylor, Director, ABA Task Force on Contribution).

[2] Defendants in this case account for approximately 75% of the total industry sales. Thus, settlement market share points represent approximately 1.33 times each defendant's actual total market share.

[3] The table reflects plaintiffs' grouping and the settlement of each corporation in each group in chronological order, expressed in terms of millions of dollars per point of market sales. Thus, as shown in the table, International Paper with 8.3% of the market settled for 1.0 per point, or $8.3 million.

Company	Amount Per Point ($ million)	Market Share	Settlement Date
FELONY INDICTEES			
International Paper	1.0	8.3	8-24-78
Champion	4.5	5.36	12-18-78
Weyerhaeuser	5.0	7.83	1- 6-79
Owens-Illinois	6.0	5.45	1-12-79
Olinkraft	6.0	1.22	1-12-79
Continental Group	6.5	4.22	1-16-79
MISDEMEANOR INDICTEES			
Boise Cascade	3.5	2.82	12-18-78
Container Corp.	4.0	8.56	1- 6-79
Inland Container	4.75	7.29	1-18-79
Stone Container	4.75	3.05	1-18-79
St. Joe Paper Co.	4.75	2.62	1-18-79
UNINDICTED COMPANIES			
St. Regis Paper Co.	.5	3.97	7-21-78
Union Camp	2.0	3.7	12-13-78
Diamond International	2.0	.5	12-14-78
Dura Container	2.0	.37	12-14-78
Chesapeake Corp.	2.4	1.26	12-18-78
Longview Fibre	2.5	2.58	12-18-78
Williamette Industries	2.7	4.18	12-18-78
Menasha Corp.	2.75	1.67	12-18-78
MacMillan-Bloedel	4.0	2.11	12-18-78
U.S. Corrugated	4.0	.76	1-25-79
Green Bay Packaging	3.25	1.71	1-25-79

This chronology demonstrates that plaintiffs required each successive settling defendant within each group to pay an ever greater amount in proportion to its sales of corrugated containers and sheets than the preceding defendant in its group. Plaintiffs' ability to coerce successive escalation settlements from individual defendants in each group rested on the simple but pernicious fact that as each successive settlement was reached, plaintiffs claimed that the potential damage exposure to each de-

fendant which had not yet settled would increase by geometric proportions.[4] Plaintiffs obtained ever greater

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[4] The Senate Judiciary Committee described the exploding potential liability on nonsettling defendants:

> "The *Corrugated Container* litigation provides an excellent example for illustrating how today's vast damage claims are used unfairly to 'whipsaw' settlements . . . . Apparently because of the large number of defendants and the disparity in the size, market share, and involvement in the alleged conspiracy, no sharing agreement existed. This, combined with the unavailability of contribution, made possible a classic example of what one witness called the whipsaw 'game theory' in application.
>
> "The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at $500,000 per percentage point of market share, and the second at $1 million. The second settlement was the more significant, for it was with a defendant which had the second largest market share (8.3%) and which was to plead nolo contendere in the criminal case. The $8.3 million settlement was clearly beneficial to the defendant because its potential liability for its own sales alone ranged from $50 to $250 million, and its total potential liability for the industry's sales ranged from over $250 million to well over $3 billion—depending on the damage estimate used.
>
> "The sum deducted from the potential liability facing the other 35 defendants was only $8.3 million, however, not the $50-250 million traceable to the settling defendant's own sales. Since this defendant was now protected from having to share in paying off that sum, the liability of the other defendants thus increased for all practical purposes by that amount overnight. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled."

S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979).

leverage in each succeeding settlement negotiation without regard to the probability of class recovery against that individual corporation.[5]

The Third Circuit in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979), noted that "courts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." Here, as a result of plaintiffs' settlement tactics, plaintiffs claim that Mead and Westvaco remain potentially liable for 100 percent of any damages in M.D.L. 310 even though they account for less than 5 percent of the corrugated container industry's sales because the market shares of the defendants who settled were not withdrawn from the case.[6] In fact, plaintiffs demanded during all settlement negotiations the nonnegotiable term that settling defendants' market shares remain in the lawsuit. Of course, in the absence of contribution, the settling defendants also had no incentive to remove their market shares from the lawsuit.

B. The Settlements Are Extortionate

The extortionate nature of the successive escalation settlement agreements in M.D.L. 310 becomes readily apparent upon analysis, as demonstrated by the following examples:

1. International Paper, the first of the felony indictees to settle, bought its peace for $8.3 million, or approxi-

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[5] If this scenario were carried to its logical conclusion, a nonsettling defendant with a 1% market share could, if all other defendants settled, be potentially liable for damages based upon 100% of an industry's sales.

[6] Plaintiffs admitted that each settling defendant "agreed to leave its sales in the lawsuit, thus making nonsettling defendants potentially liable for the full damage of the conspiracy." Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, at 34.

mately $1.0 million per "point." Continental Group, the last of the felony indictees to settle, paid $27,430,000, or $6.5 million per "point," the highest rate of any settling defendant and six and one-half times greater than International Paper. International Paper, a company with twice Continental's market share, was permitted to settle for less than one-third of Continental's settlement simply because of its early position in the escalation timetable. If Continental had settled at $1 million per point, as did International Paper, its settlement would have been $4,220,000, not $27,430,000. This $23 million difference bears no relationship to relative culpability—International Paper pleaded *nolo contendere* whereas Continental pleaded not guilty and *was acquitted at the criminal trial* —or to the merits of plaintiffs' claims—both settlements were concluded before any significant civil discovery commenced. The Continental settlement is plainly and simply attributable to the enormously increased liability that plaintiffs claimed faced Continental as a result of prior settlements. After the International Paper and St. Regis settlements, the remaining defendants who had not settled accounted for approximately 88 percent of defendants' sales. By the time Continental settled, however, the nonsettling defendants accounted for less than 40 percent of defendants' sales. Continental's increased damage exposure under plaintiffs' theory was created because no claim reduction was included in any of the preceding settlements and there was no right of contribution among defendants.

2. Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to International Paper, it paid $34.2 million, or more than four times the amount paid by International Paper, a felony indictee.

3. Although U.S. Corrugated Fibre-Box was not indicted and had the smallest market share of all defend-

ants, it settled at a rate eight times higher than St. Regis and four times higher than International Paper.

4. Even though petitioner Georgia-Pacific was identified in the criminal cases as a *victim* of the alleged conspiracy, it was forced to settle with plaintiffs for $3 million. Thus, the absence of contribution allowed *plaintiffs* to victimize Georgia-Pacific.

5. The final settlement negotiated before the criminal verdict conclusively demonstrates the extortionate nature of the M.D.L. 310 settlements. George Kress, founder and president of Green Bay Packaging Co., Inc. ("Green Bay"), testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Monopoly, and Business Rights concerning the Green Bay settlement. Mr. Kress testified that Green Bay, which was neither indicted nor named as an alleged co-conspirator, had decided to prove its innocence at trial in M.D.L. 310. After defendants having over 80 percent of sales settled, Green Bay learned that it could settle the case for $3.7 million per point, or 7.5 times the St. Regis settlement, on a take it or leave it basis. At this point, Green Bay calculated its potential liability in M.D.L. 310 to be $5 billion under plaintiffs' theory, an amount which not only would bankrupt Green Bay but also would immediately destroy its ability to borrow capital in financial markets.[7] Green Bay reluctantly settled at the amount demanded by plaintiffs only after the full impact of its potential liability became apparent. As Mr. Kress testified:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over fifty years of effort and coerced into paying an ex-

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[7] *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 33-34 (1979).

> orbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[8]

The district court recognized the inherent coerciveness of the escalation settlements in M.D.L. 310:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable . . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.* (Emphasis added.)[9]

What the district court acknowledged has become commonplace in antitrust class actions. *See, e.g., Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Shapiro* v. *General Motors Corp.*, 472 F. Supp. 636, 660 (D. Md. 1979); *Arth Main Street Drugs* v. *Beer Distributors, Inc.*, 26 F.R. Serv.2d 87 (N.D. Ind. 1978); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Alsup* v. *Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972).

Furthermore, plaintiffs' "whipsaw tactics"[10] in this case are even more objectionable than the "most favored nations" clause, the use of which in class action settlements has been consistently condemned by federal courts and the *Manual For Complex Litigation.* In each instance, not only can it be anticipated that a defendant

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[8] *Id.* at 35.

[9] Memorandum Opinion, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (May 30, 1979).

[10] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979).

whose guilt is clearest or whose pocket is deepest will settle early, but also a floor (or a built-in escalation factor) can be created for subsequent negotiations which has no bearing on the probability of class recovery against that defendant.

> As a result, a trial may be forced which nobody wants under circumstances in which all concerned, including the court, agree that a smaller settlement with the late-settling defendants would be fair and reasonable.

Manual For Complex Litigation, § 1.46 at 63. This is precisely the situation in this case. Mead faced an unacceptable choice: either capitulate to escalation settlement tactics amounting to "legalized blackmail" or go to trial and risk exposure under plaintiffs' theory to an inordinate and exorbitant judgment for damages based upon not only its own market share but also the market shares of all other defendants who had previously settled.

II. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Without a right to contribution among antitrust defendants, the class action provisions of Rule 23 of the Federal Rules of Civil Procedure combined with the rule of joint and several liability in civil damage actions and the mandatory treble damage remedy of Section 4 of the Clayton Act, 15 U.S.C. § 15, permit class plaintiffs to coerce settlements in antitrust class actions without regard to the merits of their claims. As the Third Circuit cautioned in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979): "Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." *Id.* at 586-87.

Federal courts have expressed increasing concern that the aggregation of damage claims in class actions may coerce settlements from defendants and force them to abandon meritorious defenses. Thus, this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S 463 (1978), observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

Id. at 476. In *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977), the court acknowledged that the enormous risk of classwide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not." *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The need for contribution among antitrust defendants to strike an appropriate balance in the settlement process and to protect nonsettling defendants from disproportionate liability has become even more acute with the proliferation of class actions.[11]

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[11] *See The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 19 (1979) (testimony of John Shenefield, Assistant Attorney Gen., Antitrust Div., Dept. of Justice); *id.* at 76 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 11 (1979) ("[T]he problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966. . .")

M.D.L. 310 vividly demonstrates that "unless prudence and caution are exercised by the Bench and Bar, the Class Action device can be transformed from a useful tool to an *engine of destruction.*" (Emphasis added.)[12] The absence of contribution among antitrust defendants will continue to permit plaintiffs to use class certification to coerce unjust settlements and to transform Rule 23 into a "Frankenstein monster." [13] This harsh epithet is frightfully apropos to that which has occurred in M.D.L. 310. It is precisely the abuse of Rule 23 engineered by plaintiffs in M.D.L. 310 that recognition of contribution among antitrust defendants would guard against. The right of contribution would deter only "unfair settlements based on the risk of massive liability, without regard to culpability or damage caused." [14]

The rule against contribution has long been criticized by commentators precisely for its coercive effects on set-

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[12] Oral Opinion in *Smith* v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J.), *quoted in* American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, III (1972).

[13] *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting).

[14] ABA, Antitrust Section, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, 8 (September 6, 1979), *reprinted in*, 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) ("Plaintiffs' lawyers have testified that [contribution] will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of [contribution] would simply be to lessen the coercive nature of some of the plaintiffs' lawyers negotiations, and that the only settlements [contribution] will discourage in the long run are those it is intended to discourage—namely coerced settlements").

tlements in antitrust class actions.[15] The class action device, unfettered by contribution among antitrust defendants, permits plaintiffs to aggregate trivial claims "into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction." [16] Recently, the absence of contribution in antitrust class actions was criticized "because of the possible overwhelming liability of one company for the damages of an entire conspiracy and of the ability of plaintiffs to coerce settlements from defendants who fear that liability." [17]

The certification of a large antitrust class action without rights of contribution among defendants gives rise to such tremendous pressures to settle before trial that the class action device has been aptly characterized by Professor Handler as a form of "legalized blackmail":

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been *de facto* deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The

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[15] Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111 (1962); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 Fordham L. Rev. 67 (1972); *see also Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979 (1980).

[16] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976).

[17] *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980).

only significant issue becomes the size of the ransom to be paid for total peace.[18]

Thus, there is enormous settlement pressure even on innocent defendants.[19] Defendants are compelled to settle from fear of liability for the damages of an entire alleged conspiracy.[20]

Furthermore, when the potential damage exposure of a class action exceeds the net worth of a corporate defendant, the possibility of corporate destruction becomes

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[18] Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 Columbia L. Rev. 1, 9 (1971).

[19] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976) ("No matter how sincere is [defendants'] belief in the innocence of their acts, they have little practical alternative but to settle, and certainly no alternative but to join in any settlement by [other defendants] or be left with a potential liability measured by the total damages a jury might find, trebled, less only the settlement amounts"); *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before The Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution) (estimates of potential liability for a "completely foundationless suit" range from 5% to 25%).

[20] *Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979, 995 (1980) ("[C]ontribution eliminates coercive or 'whipsaw' settlements in large cases. For example, in *In re Corrugated Container Antitrust Litigation* defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" claimed by plaintiffs) (footnote omitted); *The Antitrust Equal Enforcement Act of 1979: Hearings on S.1468 Before The Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 68 (1979) (statement of Donald Kempf) ("[T]he practicalities of the situation are such that, increasingly, businessmen are concluding that they have no real option but to settle such antitrust claims, even when they are confident that they did nothing wrong and have a solid defense").

real. Corporate management naturally tends to seek insurance against whatever remote chance of success plaintiffs may have. The settlement agreement becomes the corporation's life insurance policy, and the amount of settlement, its premium. Thus, "any settlement within [defendants'] purse, as a practical matter, may be their only chance for survival." [21]

Over the years, eminent plaintiffs' counsel have acknowledged the coercive effects of class certification by underscoring that such actions are invariably settled:

> *I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class.* . . . When two very competently represented and major litigants have settled, I think it shows this. It shows that the problem is manageable. It shows that they feel that *this is the way that the litigation can be disposed of by settlement, namely, by having a class*; whereas, if there were no class, it would not be disposed of by settlement. *So I think that you sow the seed for the possibility of a settlement.* (Emphasis added.) [22]

Furthermore, the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974), astutely predicted that injustices would occur when the class action device is misused to extract settlements from antitrust defendants who are not entitled to contribution:

> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even

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[21] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

[22] *City of Philadelphia* v. *American Oil Co.*, Civ. No. 647-68 (D.N.J.), Transcript of Proceedings, 11 (March 1, 1971).

> for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner. *Id.* at 1019.

As demonstrated above, this is precisely what happened in M.D.L. 310 without the right of contribution among defendants. The abuses to which Rule 23 is susceptible can be effectively eradicated by this Court's recognition of rights of contribution and claim reduction among antitrust defendants.

Not only has the lack of contribution rights allowed class plaintiffs in M.D.L. 310 to subvert the settlement process, but the extortionate settlements obtained through the mechanism of class certification have, in effect, rewritten substantive provisions of the antitrust laws.[23] Section 4 of the Clayton Act, 15 U.S.C. § 15, limits the recovery of treble damages to those who can prove an injury to their business or property by reason of a violation of the antitrust laws.[24] With contribution unavailable among antitrust defendants, plaintiffs in M.D.L. 310 have grossly distorted these substantive provisions by using the class action device to coerce settlements which have no bearing whatever either to the actual damages

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[23] Rule 23 is a rule of procedure which does not alter substantive statutory provisions. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

[24] This principle was affirmed by this Court in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), which held that recovery in a private antitrust action is limited to *actual* damages trebled: "In enacting [the antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation." *Id.* at 262.

which may have been suffered by class plaintiffs or to the relative culpability of each settling defendant. Thus, without contribution, antitrust class actions permit plaintiffs to shift private antitrust policy from compensation to confiscation. And the larger the stakes, the greater the incentive for plaintiffs to attempt to do just that, as has been accomplished by plaintiffs in M.D.L. 310.

CONCLUSION

For the foregoing reasons, The Mead Corporation respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit rights of contribution and claim reduction.

Respectfully submitted,

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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

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S. REP. No. 96-428, 96th Cong., 1st Sess. (1979) .... 6n.

Other Authorities

American Bar Association, *Report of the Section of Antitrust Law with Legislative Recommendation* (1979) 10

Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J. L. & ECON. (October 1980) 11

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz respectfully move this Court for leave to file the accompanying brief as amici curiae. The attorneys for the Petitioners, and for Respondents Weyerhaeuser Company and Willamette Industries, Inc., have consented to the filing of this brief. The attorneys for the remaining Respondents have declined to consent.

Our interest arises from our status as defendants in *Duplan Corporation, et al.* v. *Deering Milliken, Inc., et al.*, Consol. Civ. No. 71-306, pending in the United States District Court for the District of South Carolina. In *Duplan,* which is awaiting trial on the issue of damages, the Milliken defendants have been found liable for antitrust violations committed in combination with a third party, Leesona Corporation. Plaintiffs in *Duplan,* having settled with Lee-

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sona, now seek to recover from the Milliken defendants some $27.5 million in treble damages attributable to Leesona's acts. The Milliken defendants have obtained the court's permission to amend their pleadings to assert an affirmative defense of claim reduction.

The case at bar raises the broad issue of whether there should be a right of contribution for defendants in antitrust actions. Because plaintiffs in this case have reached settlements with most of the defendants, the issue of contribution must here be considered in connection with its corollary doctrine of claim reduction, a rule designed to achieve apportionment of damages in cases that involve partial settlements. The briefs submitted by the parties on the petition for certiorari have contained relatively little discussion of claim reduction, and it has even been suggested by certain Respondents that claim reduction is not properly part of the case.

Because we believe, on the contrary, that claim reduction is of central importance to the disposition of this case, it is likely that the accompanying brief will contain a more direct treatment of the question than might otherwise be before the Court.

Dated: August 14, 1980

Respectfully submitted,

/s/ Simon H. Rifkind

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BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chavanoz submit this brief as amici curiae. We urge the court to adopt a combined rule of contribution and claim reduction for treble-damage antitrust litigation. By "contribution" we mean the right of a defendant who has paid a judgment to obtain contributions to that payment from fellow wrongdoers in proportion to their equitable responsibility for the damage suffered by plaintiffs. "Claim reduction" comes into operation when a plaintiff has settled with some but not all of those responsible for his injury. Claim reduction reduces the plaintiff's ultimate judgment against nonsettling defendants in proportion to the settling defendants' equitable share of the

damages: *i.e.*, in the amount for which settling parties would have been liable for contribution had they not settled.

Interest of the Amici

Milliken* is a defendant in an antitrust action, *Duplan Corp.* v. *Deering Milliken, Inc.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 666 (1980).

In *Duplan*, Milliken was found to have conspired with Leesona Corporation to fix the royalty rates charged by Milliken and Leesona for the use of certain textile machinery patents which each licensed. The case is now awaiting trial on the issue of damages. In the four years antedating the outbreak of litigation, the plaintiffs claim to have paid $9.7 million in royalties to Leesona, while paying only $5.6 million to Milliken. Plaintiffs in *Duplan* subsequently settled with Leesona for $1.5 million. They now seek to recover from Milliken the whole amount of the royalties paid to both conspirators, trebled, less only the $1.5 million received in settlement. In addition to liability for its own acts, therefore, Milliken faces a potential liability of $27.5 million for damages attributable to the acts of its competitor—a burden of damages shifted to Milliken by Leesona's settlement with the plaintiffs.

The *Duplan* court has granted Milliken's motion for permission to amend its pleadings to assert an additional affirmative defense of claim reduction. Noting "the uncertainty of the state of the law" on the subject of contribution and claim reduction in antitrust litigation, the court "found

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* Milliken & Co., Milliken Research Corporation and Moulinage et Retorderie de Chavanoz, although jointly represented, are separate entities having distinct roles in the matters at issue in *Duplan*. For present purposes, however, we will ignore these distinctions and refer to the amici together as "Milliken."

appealing the logic of the defendants' position here when considered in light of the peculiar facts of this case" and concluded that the motion to state a claim reduction defense should be allowed. *Duplan Corp.* v. *Deering Milliken, Inc.*, Consol. Civ. No. 71-306 (D.S.C. August 4, 1980).

The ultimate recognition of such a defense may well be determined by this Court's decision here. It is of the utmost interest to Milliken, therefore, that this Court give careful consideration to the role of claim reduction in analyzing the general question of damage apportionment in antitrust cases.

Statement of the Case

The case at bar is a consolidated, industry-wide class action alleging price fixing by manufacturers of corrugated containers. Plaintiffs' estimates of total damages to all class members, trebled, have been as high as $5.9 billion. (Petition for certiorari at 3.)

Plaintiffs' claims against most of the defendants will never be tried, because this case has been litigated primarily through settlements. Using two "bargain" settlements as an entering wedge, plaintiffs exerted ever-increasing settlement pressure on the remaining defendants: since every defendant that settled for less than its proportional share of the total damages effectively increased the potential liability facing any nonsettling defendant. In what could serve as a textbook example of game theory—the price of settlement, per unit of market share, increased with each settlement that was reached—plaintiffs eventually obtained more than $300 million in settlements with defendants representing more than 80 per cent of the market. (Petition for certiorari at 3-4 & Appendix D.)

As a result of these partial settlements, any nonsettling defendant against whom plaintiffs may eventually obtain a

judgment will be potentially liable for billions of dollars in damages attributable to the overcharges of its settling competitors. The inequity of this massive shifting of liability from one defendant to another—and the spectacle of a coercive settlement process virtually supplanting a trial on the merits as the vehicle for enforcing the private damage provisions of the antitrust laws—make this case a striking illustration of the need for rules of damage apportionment in antitrust cases.

Summary of Argument

This Court now faces the question of whether such rules should be adopted, and in what form. We submit that the most coherent approach to damage apportionment—evolved through case law, legislative proposals, and commentary—combines a right of contribution between the parties liable for an injury, where no partial settlements intervene, with a rule of claim reduction where there have been partial settlements. Since in the case at bar there have been extensive settlements, we ask the Court to declare claim reduction the proper remedy.

I.

CLAIM REDUCTION AFFORDS AN EQUITABLE APPORTIONMENT OF DAMAGES IN CASES INVOLVING PARTIAL SETTLEMENTS.

If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.

We are sure that the parties' briefs will discuss at length the conflict in the Courts of Appeals on the broad issue of damage apportionment and the desirability in general of a rule permitting contribution in antitrust cases. Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendants.

Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled. By acceptance of a partial settlement, in other words, the plaintiff is regarded as having sold his claim for any damages attributable to the party with whom he settles.

A. Claim Reduction Is Equitable

The argument for claim reduction rests on fairness. As the Eighth Circuit declared, approving contribution in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (1979):

> The deciding factor in our decision is fairness between the parties. . . . There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Where the same shifting of burdens occurs through the mechanism of partial settlements, identical considerations support a corrective rule of claim reduction.

In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court recognized as an ultimate objective "the 'just and equitable' allocation of damages" among defendants, observing that

> worldwide experience has taught that that goal can be more nearly realized *by a standard that allocates liability for damages according to comparative fault whenever possible.* (421 U.S. at 411; emphasis added.)

The equitable objective identified in *Reliable Transfer* is fully as applicable to amounts paid in settlement as it is to damage judgments. That objective is disserved not only when a defendant faces a judgment for damages fairly attributable to the acts of others; it is equally disserved whenever a settling wrongdoer pays less than his equitable share of the damages because the plaintiff finds it expedient to shift that burden to someone else. It is disserved, again, if settling defendants are forced by fear of ruinous judgments to pay more than a reasonable compromise of their own potential liability, because of the coercive tactics often employed by plaintiffs in obtaining class-action settlements.*

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* A detailed description of the settlement strategy employed in this case may be found in the briefs of the parties on the petition for certiorari and may be expected to appear in their briefs on the merits. The problem of coercive settlements was addressed in congressional hearings on S. 1468 and in the subsequent report of the Senate Judiciary Committee. *See Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) at 32-48, 66-72; S. REP. No. 96-428, 96th Cong., 1st Sess. (1979) at 1-3, 14-17.

The power to shift a massive burden of damages from one defendant to another—to offer favorable terms to one defendant when it suits plaintiff's advantage, and in doing so to increase the burden facing any defendant that wishes to litigate—obviously provides antitrust plaintiffs with an incalculable strategic advantage in negotiating settlements. But it is an advantage obtained at the expense of equity and due process to the antitrust defendant, and at the expense of the integrity of the legal system under whose aegis the settlements are extracted.

The antitrust laws provide that violators shall be liable for three times the damages caused to a plaintiff, and the equitable principles embodied in *Reliable Transfer* suggest that justice will be best served if each defendant is liable for the full extent of his own wrong, no more and no less. Yet in the absence of contribution and claim reduction, an antitrust plaintiff may vary at will the statutory penalty as it applies in practice to a given defendant, mulcting one for five or ten or a hundred times the amount by which he overcharged the plaintiff (to take a price-fixing example), while letting another off scot-free. The proper role of private attorneys-general does not extend to this unprincipled and self-serving discretion.

Contribution and claim reduction do not interfere with joint and several liability, since a plaintiff remains free to sue anyone he chooses and collect his judgment from anyone he can. Nor does claim reduction detract from a plaintiff's right to collect the whole of the damages to which he is entitled. Simply stated, under claim reduction a plaintiff is considered to have sold his claim for any damages attributable to the defendant with whom he settles, and to have received full satisfaction for that portion of his claim upon terms negotiated by himself. *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 (5th Cir. 1979);

Martello v. *Hawley,* 300 F.2d 721, 724 (D.C. Cir. 1962). There is no harshness in such a rule, which merely imposes the arm's-length standards by which settlements in most litigation are ordinarily reached. It would simply remove from the antitrust plaintiff the anomalous power to "compromise" a claim without giving up anything—a power he enjoys if whatever is foregone in settlement with one defendant may be recouped from another less favored.

Even if a partial settlement fairly reflects the settling defendant's potential liability at the time it is made, claim reduction is still necessary to avoid a degree of double recovery in a subsequent judgment. The net present value of a claim that is settled is not the same as the anticipated judgment in the event plaintiff is successful: it is the anticipated recovery less a discount, normally substantial, for the likelihood of success, the expense of litigation, the time value of money, and related factors. These elements of the settlement must equal in value the differential between the settlement price and the anticipated recovery in the plaintiff's own estimation, since otherwise the plaintiff would not settle. If the plaintiff then proceeds to judgment against another defendant, and recovers from him the damages attributable to the settling defendant less only the cash received in settlement, the value of the non-cash differential has been recovered twice.

As this Court noted in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 348 (1971), a double recovery is not permitted:

> It is settled that, entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double repayment.

Nothing obstructs the extension of this logic to cover the non-cash value of a partial settlement except the difficulty of valuation. Under a rule of claim reduction the problem is eliminated, because the necessary valuation is performed by the settling parties themselves. To apply claim reduction in respect of such a settlement is merely to hold the plaintiff to his own bargain.

B. The Authorities Supporting Antitrust Contribution Foresee Claim Reduction as the Means to Resolve the Problem of Partial Settlements

By suggesting that claim reduction must necessarily be considered part of the question of damage apportionment in the instant case, we are not asking the Court to decide a different question from the one it granted certiorari to consider. On the contrary, the theory of contribution in antitrust cases, as advanced by its recent proponents, anticipates the problem of partial settlements and incorporates a rule of claim reduction as the preferred solution.

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), in which it was held that antitrust defendants might have a cross-claim for contribution against co-conspirators, was a case that did not present for decision the problem of partial settlements. Nevertheless, the Eighth Circuit's ruling in favor of contribution was conditioned on the assumption that "in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants," 594 F.2d at 1184. The first district court to put this admonition into practice has interpreted it to require a rule of claim reduction. In *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979), the district court held that a proposed antitrust settlement could not be approved unless (i) a settling defendant were released from subsequent liability for contribution, and

(ii) nonsettling defendants were released "from liability for the settling defendant's actions."

Both the antitrust contribution bill pending in Congress, and the legislative proposal for antitrust contribution prepared by the ABA Section of Antitrust Law, incorporate provisions for claim reduction in cases of partial settlements. The pending bill, which would establish contribution only in price-fixing cases, provides that a settling plaintiff's claim against remaining defendants shall be reduced by the greatest of (1) an amount stipulated in the settlement; (2) the consideration received by the plaintiff; or (3) "treble the actual damages attributable to the settling person's sales or purchases of goods or services." S. 1468, 96th Cong., 1st Sess., § 4I(b) (1979).* The ABA proposal, not restricted to price-fixing cases, provides that following a partial settlement a plaintiff may "elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person" and that, failing such election, "the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement." American Bar Association, *Report of the Section of Antitrust Law with Legislative Recommendation* § (f) (1979); *see* 49 Antitrust L.J., No. 1 (scheduled for Fall 1980 publication). The full text of these proposed statutes is set forth in the Appendix to this brief.

Recent commentary on the subject of antitrust contribution also proceeds on the assumption that claim reduction would be a necessary part of any contribution rule. A *Harvard Law Review* Note, reviewing the judicial opinions and legislative proposals in the area of antitrust contribu-

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* An identical bill has been introduced in the House of Representatives as H.R. 6792, 96th Cong., 2d Sess. (1980).

tion, concludes both that contribution should be allowed and that courts should apply claim reduction in cases of partial settlements. Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1560-61 (1980). A forthcoming article by Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,** although generally critical of contribution, concludes nevertheless that claim reduction should be incorporated in any rule of contribution that might be adopted:

> If contribution is adopted, it should be limited to nonsettling defendants (*i.e.,* a defendant who has settled cannot be sued for contribution) and a litigating defendant's liability should be reduced by the amount the settling defendants would have been required to pay in contribution if no one had settled . . . .

Further reason for regarding claim reduction as an integral part of the overall question before this Court is found in the decisions and statutes in other areas of the law in which the theory of claim reduction was developed as a complement to rules of contribution. A leading decision in this area is the opinion by Mr. Justice Brennan, then a Justice of the Supreme Court of New Jersey, in *Judson* v. *People's Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954). In *Judson,* a fraud case, the court construed a contribution statute that was silent on the question of partial settlements and concluded that an implied rule of claim reduction was the "clearly preferable" solution:

> Collusive settlements are wholly ineffective when a credit of any settler's *pro rata* share is the required

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* The article is scheduled to be published in 23 J. L. & Econ. (October 1980).

> result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." (17 N.J. at 93, 110 A.2d at 36-37; citation omitted.)

Comparable federal decisions include *Gomes* v. *Brodhurst,* 394 F.2d 465, 468-69 (3d Cir. 1968) (adopting rules of contribution, claim reduction, and comparative negligence for the Virgin Islands); *Martello* v. *Hawley,* 300 F.2d 721, 723-24 (D.C. Cir. 1962) (claim reduction for the District of Columbia); and *Doyle* v. *United States,* 441 F. Supp. 701, 710-13 n.5 (D.S.C. 1977) (claim reduction for maritime collision cases).

Recent statutes establishing contribution between joint tortfeasors also incorporate claim reduction provisions. An example is New York's General Obligations Law § 15-108 (1974), providing for claim reduction "in the amount of the released tortfeasor's equitable share of the damages" in terms of relative fault. Similar provisions appear in the new Uniform Comparative Fault Act, 12 U.L.A. (1980 Supp.) 32-42, approved in 1977 by the Commissioners on Uniform State Laws. The full text of N.Y. Gen. Oblig. L. § 15-108, and pertinent extracts from the Uniform Act, are set forth in the Appendix to this brief.

In sum, the clear consensus of the courts, legislative draftsmen, and commentators that have considered the issue of contribution in the context of partial settlements

favors claim reduction as the only means "to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible." *McKenna* v. *Austin,* 134 F.2d 659 (D.C. Cir. 1943) (Rutledge, J.). The issue of antitrust contribution thus comes to this Court with claim reduction comprising an inescapable component of the proposed rule.

C. Significant Objections to Allowing Antitrust Contributions Are Answered by the Inclusion of Claim Reduction

Inclusion of claim reduction in a rule of contribution removes or greatly ameliorates most of the practical objections to contribution in antitrust cases, as advanced by the district court below. Because claim reduction is designed to meet these very objections, the merits of a contribution rule cannot properly be evaluated in isolation from its claim reduction component.

The principal objection advanced against contribution *per se* is the deterrent to settlements that would result from a rule that left settling defendants exposed to subsequent contribution claims. Claim reduction obviates this difficulty entirely: indeed, the whole point of claim reduction is to provide a means of damage apportionment while preserving for any defendant the option to "buy his peace" through settlement with the plaintiff.

The suggestion that claim reduction itself would discourage compromise, by reducing a plaintiff's incentive to make partial settlements, does not withstand scrutiny. By treating each partial settlement as a negotiated sale of that portion of a plaintiff's claim fairly attributable to the acts of a given defendant, claim reduction would assuredly discourage collusive settlements, or settlements which—though not strictly collusive—depend for their attractiveness on the recognition that the settling defendant's proper

burden of liability is being shifted to someone else. This aspect of claim reduction, however, is one of its virtues. There would remain for plaintiffs and defendants alike the possibility of settling on the basis of an arm's-length compromise of the plaintiff's anticipated recovery against a given defendant. Such are the conditions that obtain whenever any lawsuit between a single plaintiff and a single defendant is settled; and there is no reason to suppose that they should prove an obstacle to settlement in antitrust cases.

Contribution and claim reduction both require a means of allocating responsibility for plaintiff's injury between defendants, but the mechanics of allocation will not necessarily increase plaintiff's burden of litigation. The Eighth Circuit has held a *pro rata* apportionment to be equitable in a monopolization case, *Professional Beauty Supply, supra,* 594 F.2d at 1182, n.4. In other kinds of antitrust cases—a horizontal price-fixing case being the most notable example—the nature of the anticompetitive conduct permits a direct determination of the proportion in which each defendant contributed to plaintiff's injury; and in such cases, we submit, it is most appropriate that damage apportionment be made a function of the economic transactions that are the basis of liability. This is the approach adopted by S. 1468, which would apportion damages for price-fixing in accord with "the settling person's sales or purchases of goods or services"; *see also* Note, *Contribution in Private Antitrust Actions, supra,* 93 Harv. L. Rev. at 1560.*

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* As the present case amply demonstrates, such an allocation of responsibility need not add to plaintiff's litigation burden any more than would a simple *pro rata* rule. Here, plaintiffs have already entered numerous settlements on the basis of their own assessment of defendants' relative shares of the container market. Since the market shares so assessed have been the foundation of the settlements in question, they constitute the ideal basis of apportionment for claim reduction purposes.

Finally, any objection to the supposedly "retroactive" character of contribution as applied to this case is largely mooted by a claim reduction rule. The settling defendants, who hoped to buy their peace at the cost of immense settlements, would doubtless complain of the unfairness of having to respond to subsequent claims for contribution from nonsettling co-defendants: but claim reduction bars such claims. Any suggestion of unfairness to the plaintiffs—that they settled with certain defendants in the expectation of being able to shift some part of their liability to others—would be difficult to maintain in the face of the huge amounts here extracted in settlement. Plaintiffs in this case have received more than $300 million in settlements—all, it should be remembered, without having had to prove liability on the part of anyone. (Petition for certiorari at 4 & Appendix D.)

II.

THE QUESTION OF CLAIM REDUCTION IS NECESSARILY BEFORE THE COURT.

Some Respondents may argue that this Court has no power to consider the merits of claim reduction because Petitioners' separate claim reduction motion was not decided by a final order in the district court.* They would

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* By separate motions in the trial court, Petitioners sought to assert (i) cross-claims for contribution and (ii) an affirmative defense of claim reduction. Both motions were denied. (Appendix E to petition for certiorari.) Final judgment pursuant to FED. R. CIV. P. 54(b) was entered with respect to the contribution motion only; and in a subsequent order the district court suggested that the question of claim reduction could be raised again when the case was submitted to the jury. 1980-1 TRADE CAS. ¶ 63,163 at 77,790 (S.D. Tex. December 21, 1979) (order approving settlements). The Fifth Circuit affirmed the order of the district court as it related to contribution and held that the question of claim reduction, because it had not been decided by a final order, was not properly before it on appeal. (Appendix B to petition for certiorari.)

have the Court evaluate a truncated rule of contribution, stripped of its claim reduction component—one which could readily be attacked for its adverse effect on settlements. But no one advocates such a rule for antitrust cases; and the Court's deliberations, if thus artificially limited, would be expended in the scrutiny of a legal chimera.

The disposition of Petitioner's claim reduction motion in the district court is irrelevant because that separate motion was surplusage. We know of no authority supporting a right of contribution in antitrust cases that does not regard claim reduction as an essential part of the rule where partial settlement are concerned. The present case involves partial settlements, so it necessarily raises the claim reduction issue.

Because the Fifth Circuit rejected out of hand any rule of damage apportionment in antitrust cases, it had no need to reach the further question of how such a rule might be applied to cases in which there have been partial settlements. Had it done so, it would have found that claim reduction was an integral part of the question before it. For the same reason, claim reduction is necessarily part of the question presented here.

CONCLUSION

For the reasons stated, the decision of the Fifth Circuit should be reversed, with directions that the district court permit the assertion of claims for contribution against non-settling defendants, and that plaintiffs' eventual judgment be subject to claim reduction to account for the settlements already made.

Dated: August 14, 1980

Respectfully submitted,

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STATUTORY APPENDIX

S. 1468, 96th Cong., 1st Sess. (1979):

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability

by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

Contribution Amendment to the Clayton Act, Proposed by American Bar Association Section of Antitrust Law (1979):

"Section . *Contribution Rights of Defendants.*

"(a) In any action brought under section 4, 4A or 4C of the Act, if the damages recoverable from any defendant were, in whole or in part, caused by the wrongful acts or omissions of another, rights of contribution shall exist and be enforceable in accordance with this section, and not otherwise.

"(b) Claims for contribution in antitrust actions may be asserted by the filing of a counterclaim, cross-claim or third party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

"(c) Claims for contribution will be barred unless they are filed (i) within one year of the date of service of the original complaint giving rise to potential liability, or (ii) within sixty (60) days after the claimant for contribution receives reasonable notice of his liability or potential liability based in whole or in part upon damages caused by the wrongful acts or omissions of another, whichever date occurs later. Notwithstanding the foregoing, claims for contribution shall be barred unless they are filed within sixty (60) days after the entry of final judgment by the district court awarding damages against a prospective claimant for contribution.

"(d) Contribution rights may be claimed only against those persons for whose wrongful acts or omissions plaintiff seeks to recover damages from one or more defendants.

"(e) Contribution may not be obtained in favor of or against a person who, pursuant to a settlement agreement with a plaintiff in the action in respect of which contribution rights are claimed, has been released from potential liability for the underlying claim. To avail itself of this paragraph, a settling defendant must advise the court and all other defendants, in writing, of the existence of the settlement agreement within sixty (60) days of its execution.

"(f) Following a settlement in the action in respect of which contribution rights are claimed with less than all defendants, the plaintiff may, within sixty (60) days of the settlement, elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person or persons. Failing such an election by plaintiff, the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement.

"(g) Contribution claims shall be determined by the court following the trial of the action in respect of which contribution rights are claimed in accordance with the relative responsibility of each party for the damages awarded in the main action which are subject to contribution rights as provided herein.

"(h) Nothing in this section shall preclude two or more persons from agreeing to (i) apportion their collective liability in some manner other than as specified in this section or (ii) toll the automatic barring effect of paragraph (c).

"(i) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section."

New York General Obligations Law § 15-108 (1974):

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the

same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

Uniform Comparative Fault Act (1977) (extracts):

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories, or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

* * *

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

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OCTOBER TERM, 1979

No. 79-972

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v.

Adams Extract Company, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

Motion and Brief for Olson Farms, Inc.
as *Amicus Curiae*.

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Motion for Leave to File *Amicus* Brief.

Olson Farms has requested permission to file its *Amicus Curiae* brief from counsel representing the parties to this litigation. Counsel for Petitioners Westvaco Corp., Packaging Corp. of America and Georgia-Pacific Corp. and counsel for Respondents-Defendants Weyerhaeuser Company and Williamette Industries have all given consent to filing an *Amicus Curiae* brief. Counsel for the remaining Respondents-Defendants and counsel for Respondents-Plaintiffs have declined consent.

Olson Farms, Inc., a Delaware corporation, respectfully moves this Court for leave to file an *Amicus* brief in

support of petitioners' position that contribution should be allowed under the antitrust laws.

Olson Farms has a substantial interest in the outcome of the controversy now before this Court. At the present time Olson Farms is the appellent in two separate suits awaiting rehearing *en banc* before the Tenth Circuit Court of Appeals which involve the question of contribution under the antitrust laws.

The manner in which the question concerning contributions arose is markedly different in the Tenth Circuit cases than in the case before this Court. It is important that this Court be informed of the procedural difference in the Tenth Circuit cases before this Court considers the possible formulation of an antitrust contribution rule of law which may be applicable to all controversies.

The first case, *Olson Farms, Inc., vs. Safeway Stores, Inc., et al.*, No. 77-2068, arose from a 1971 action (Cackling Acres case) in which certain Utah egg producers filed a suit against Olson Farms under the antitrust laws alleging that Olson Farms conspired with other companies to pay producers less for their eggs than they otherwise would have received. Even though most of the plaintiff-producers did not sell to Olson Farms, they nevertheless sought recovery solely against Olson Farms and declined to name the other co-conspirators as defendants.

At trial, the undisputed evidence was that Olson Farms purchased only approximately 11 percent of the eggs for which damages were claimed. The other identified conspirators purchased nearly all of the remaining 89 percent of the eggs. A jury verdict was returned against Olson Farms and it ultimately satisfied a judgment of nearly $2,500,000 — an amount approximately 10 times its market share.

No settlement was made between plaintiff and any of the other co-conspirators in that action. The matter was appealed to the Tenth Circuit Court of Appeals which

affirmed the lower court judgment. *Cackling Acres vs. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Olson Farms initiated Civil No. 77-2068 in 1975 by filing a Complaint against all of the companies identified by the plaintiff-producers in their successful action as co-conspirators. Thus, No. 77-2068 was an independent lawsuit commenced after termination of the plaintiffs' case. The defendants were successful in persuading the district court to dismiss the case on the ground that the antitrust laws did not permit contribution.

On appeal, a divided 2-1 panel of the Tenth Circuit Court of Appeals affirmed the lower court's dismissal. The majority opinion, written by a judge of the United States Court of Customs and Patent Appeals, held that a defendant in an antitrust action may not obtain contribution from others, in most circumstances, but suggested that contribution may be permitted in very limited circumstances. The Honorable William J. Holloway, Jr., dissented from the portion of the majority opinion denying a right to seek contribution, saying that the sounder result, consistent with equitable principles, would be to permit contribution among joint tortfeasors in antitrust actions.

Olson Farms petitioned for a rehearing and suggested rehearing *en banc*. Its petition was granted on December 27, 1979, and hearing in the case is scheduled for September 15, 1980.

The second suit now before the Tenth Circuit Court of Appeals is No. 78-1773. This case originated in 1975 when the successful plaintiffs-producers in the 1971 action filed a second lawsuit against Olson Farms and all the other principal co-conspirators except for Safeway Stores, Inc. This time plaintiffs sought damages from the date of the first complaint until the jury verdict was returned in March of 1974. Olson Farms crossclaimed against each of the co-defendants, and filed a third-party complaint against Safeway Stores, Inc.

On December 19, 1977, the district court, relying upon its decision in No. 77-2068, dismissed the crossclaims and third-party complaint. In its opinion, the district court stated: "There is no readily discernable distinction between the earlier claims for contribution and indemnity and the present one."

Although not contained in the court record, at oral argument Olson Farms stated that it and all other defendants had settled with the plaintiffs. The crossclaims and third-party claims, however, were not settled. The Tenth Circuit Court of Appeals panel in a 2 to 1 decision found no distinction between this case and No. 77-2068 and further found that since a settlement had occurred the determination of liability among the various co-conspirators would require further proceedings and involve obvious complexities which would require Congressional guidelines as to how such matters should be resolved.

The dissenting opinion filed by Judge Holloway stated that since the settlements were not in the record it was improper for the court to judge the possible merits of claims without any determination as to the liability of the parties. Judge Holloway incorporated his previous dissent in No. 77-2068 that contribution should be allowed in antitrust cases.

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The present controversy now before this Court concerns dismissal of the crossclaims and affirmative defenses of petitioners against the settling defendants. The two Olson Farms cases, however, illustrate completely separate procedural distinctions. In the first case, Olson Farms sued its co-conspirators after the termination of

plaintiffs' original suit by the means of an independent action. In the second case, Olson not only filed crossclaims as in the present case, but also filed a third-party complaint against an unnamed co-conspirator. In addition, the plaintiffs settled their dispute with all named defendants whereas in the instant case only some of the defendants have settled with the plaintiffs.

Olson Farms believes that the above procedural distinctions are important since they illustrate concrete factual circumstances in which contribution claims can arise. Since the facts in the present case do not encompass the above areas, it is unlikely that such factual circumstances will be considered by the parties before this Court. This Court should be informed of these distinctions, however, in order to make a comprehensive study of the ramifications of adoption of a rule permitting or prohibiting contribution.

In the alternative, Olson Farms wishes to argue its *amicus* position that, should this Court resolve the contribution issue based solely upon the facts in the instant case, this Court should not preclude the question of contribution in the procedural context now pending before the Tenth Circuit Court of Appeals. In such a case, this Court should await petition by the parties to the Olson Farms litigation to determine the contribution question in a context markedly different from that now before this Court.

Finally, Olson Farms moves this Court for permission to file an *amicus* brief since it believes that its experience during the last nine years of antitrust litigation may prove informative to this Court in formulating its decision as to the merits of antitrust contribution. Olson Farms believes that it can materially assist the Court in its disposition of the case in that Olson Farms' input

would be helpful in resolving the important question now pending.

Respectfully submitted this 27th day of August, 1980.

Harold G. Christensen
Michael R. Carlston
Robert H. Henderson
Craig S. Cook
of counsel

Attorneys for Olson Farms, Inc.

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In the alternative, Olson Farms wishes to argue its *amicus* position that, should this Court resolve the contribution issue based solely upon the facts in the instant case, this Court should not preclude the question of contribution in the procedural context now pending before the Tenth Circuit Court of Appeals. In such a case, this Court should await petition by the parties to the Olson Farms litigation to determine the contribution question in a context markedly different from that now before the Court.

Finally, Olson Farms believes that its experience during the last nine years of antitrust litigation may prove informative to this Court in formulating its decision as to the merits of antitrust contribution.

ARGUMENT

There is little dispute among the authorities or the parties to this lawsuit that federal common law controls the question of whether contribution is allowable in antitrust cases. As stated by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 699 (1978):

> Congress,. . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. Legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.

While arguments have been raised that the contribution question is a legislative matter, the 8th Circuit Court of Appeals in *Professional Beauty Supply v. National Beauty Supply,* 594 F.2d 1179 (8th Cir. 1979), countered this argument by stating:

> We initially note that antitrust statutes are not purported to be comprehensive and, possibly as a result, courts have not been prone to await Congressional action to resolve many of the questions left unanswered by the statute, such as the nature of the cause of action, apportionment of judgments, assignments, survival and limitations. We further observe that there is a dirth of case law on this issue and comment that a complicated legal issue which is raised so infrequently is unlikely to spur immediate Congressional action. Finally, we find further support for our position from the fact that federal courts have been willing to formulate rules for contribution in other areas of the law without express Congressional direction. (See cases cited therein.) *Id.* at 1184-1185.

In addition to those cases cited in *Professional Beauty Supply, supra,* the Third Circuit Court of Appeals in *Glus et al vs. the G. C. Murphy Company, et al.,* 23 FEP Cases 86

(3rd Cir. filed June 27, 1980) held that contribution was permissible under Title VII of the Civil Rights Act of 1964, even though the statute itself did not give such a right.

Amicus Olson Farms also concurs in the views of Petitioner as expressed in its Reply Brief in Support of its Petition for Certiorari that the pendency of Senate Bill 1468 should not be considered by this Court in its decision. (Petitioner's Reply Brief, pp. 7-8).

Assuming, therefore, that this Court should determine the question of contribution in antitrust cases as a matter of federal common law, there are four principal reasons that justify contribution in antitrust cases: (1) fairness, equity and fundamental antitrust policy dictate that contribution be allowed; (2) the deterrent effect of the antitrust laws would be enhanced by contribution; (3) the complexity of antitrust litigation will not be significantly increased by contribution; and (4) contribution will not interfere with orderly settlement of antitrust litigation. *See e.g.*, Note, 93 *Harvard Law Review* 1540 (1980).

Amicus Olson Farms will address each of these factors in light of general statutory and judicial law and relate each fact to the specific problem *Amicus* Olson Farms has encountered in its litigation.

POINT I

CONTRIBUTION IS IMPORTANT TO THE FAIR AND EQUITABLE ENFORCEMENT OF THE ANTITRUST LAWS AND PROMOTION OF COMPETITION.

The unfairness of a rule against contribution is a primary reason for its alteration. "[T]here is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are

responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrong-doers." *Professional Beauty Supply, Inc., v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979).

The first Olson Farms case dramatically illustrates this statement. Olson Farms purchaed eggs from only three of the 14 plaintiffs, and only purchased 11 percent of the total eggs sold by the plaintiffs. Most of the remaining 89 percent of the eggs were purchased by the defendants named by Olson Farms in No. 77-2068, *Olson Farms, Inc., v. Safeway Stores, Inc.*, 1979-2 Trade Cas. Para. 62,995 (10th Cir. 1979).

Evidence at the *Cackling Acres* trial showed the number of eggs purchased and the damages claimed by the plaintiffs as to each egg buyer as follows:

Egg Buyer	Dozens Purchased	Damages Claimed
Safeway Stores	6,297,888	$271,129
Egg Products Co.	4,497,222	197,618
Countryside Eggs & Gusto Marketing	2,724,824	119,961
Snow White Egg Co.	3,574,070	157,052
Olson Farms	2,288,650	99,656

Thus, although the damages claimed as to Olson Farms was only approximately $100,000, and even trebled was only approximately $300,000, because of the lack of contribution, Olson Farms was forced to satisfy a judgment of nearly $2,500,000.

The plaintiff chose to sue Olson Farms alone because of its solvency and because the plaintiffs had ceased selling eggs to Olson Farms. It was explained by one of the plaintiffs at the *Cackling Acres* trial that Olson Farms was sued, and other purchasers of eggs were not, because suing the other distributors would have disrupted the ongoing business relationship between them. The following colloquy occurred between *amicus'* counsel and a plaintiff.

Q. You didn't sue Countryside in this case?
A. No, sir.
Q. Why not?
A. For the simple reason that we were doing business with them, and they was taking our eggs. And it's pretty hard when you have 1,200 cases on the market to be dropped.

(Cross-examination of Bud Jones Shepherd by H. Christensen, January 29, 1974, official transcript of *Cackling Acres*, pp. 4632, 4633.)

The present status of the law that a single defendant may be obligated to answer for the practice of an entire industry is not only inequitable, but is also economically unwise. Assuming that all defendants in an antitrust conspiracy are equally accountable, the law places an unequal burden upon the defendants and, in fact, many times allows a co-conspirator to escape all liability even when the co-conspirators were the moving force behind the conspiracy. The co-conspirator, therefore, is allowed to go "scot free" because of the "whim or spite" of the plaintiff. *Professional Beauty Supply, supra,* 504 F.2d at 1185.

Judge Holloway was concerned about the lack of fairness of a rule against contribution as applied to the facts in the Olson Farms case. In his dissenting opinion he stated:

> *It does not seem to me that an antitrust defendant found guilty of a violation should be rejected as a lost soul with no claim on the conscience of the court.* The result of imposing the entire treble damage liability on one defendant while denying him any right to seek contribution from others jointly involved with him in the wrong, is too extreme for me. In this instance the damages claimed against Olson Farms, as the majority opinion states, were $99,656 and, trebled, the alleged liability would have amounted to $298,968. Yet the averment is that Olson satisfied a judgment, plus costs, interest and attorneys' fees, by paying the

> plaintiffs in the 1971 suit the sum of $2,405,580. (slip opinion, page 5.) (Emphasis added.)

Even again assuming that a defendant in an antitrust action is guilty of prohibited conduct, this fact should not permit unjust enrichment by both the plaintiff and the other co-conspirators. As noted in *Glus v. G. C. Murphy Company, supra,* regarding contribution under the Civil Rights Act, the court stated:

> The contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. See Note, "Settlement in Joint Tort Cases," 18 *Stan. L. Rev.* 486, 490 (1966).

Likewise, Judge Holloway in his dissent noted that the allegations of Olson Farms made a compelling claim for recovery to avoid unjust enrichment of the other defendants on the theory that the damages paid by Olson Farms for the other defendants were directly related to the benefit those defendants received by purchasing eggs at the unlawfully depressed prices. (Slip opinion, p. 5-6). The effect of which is, of course, to weaken rather than strengthen competition because all conspirators have not been required to restore their improper gains.

The overall effect of this type of unjust enrichment is extremely anti-competitive particularly in integrated industries like the egg industry where competitors of plaintiffs at one level may be driven out of business if they are selectively named sole defendants in a suit involving their activity at a completely separate level of industry.

The Fifth Circuit Court of Appeals in *Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.,* 604 F.2d (5th Cir. 1979), recognized that an inequity may result when all antitrust violators were not treated equally. *Id.* at 905-906.

Furthermore, it should not matter when a claim for contribution arises, whether at the time litigation is commenced or after an unsuccessful attempt to defend an antitrust claim. The principles of fairness and equity require that all parties be treated the same. The objective of the antitrust laws can be well served only when this occurs.

For these reasons, the equity and fairness of the judicial system and the fundamental policy of the antitrust laws in promoting competition require contribution to be allowable in antitrust litigation.

POINT II

ALLOWING CONTRIBUTION WOULD INCREASE RATHER THAN DECREASE THE DETERRENT EFFECT OF THE ANTITRUST LAWS.

Opponents of contribution argue that the possibility of imposition of sole liability for an industry-wide practice has an enhanced deterrent effect on any potential violator of antitrust laws. The chance that a participant may be faced with a full judgment is thought to be more likely to discourage anticompetitive conduct than would ensuring that each participant pays only a share. *Wilson P. Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897, 901 (5th Cir. 1979); *Sabre Shipping Corporation v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969). This argument, when considered against the backdrop of a concrete situation such as Olson Farms No. 79-2068, does not have merit. It makes little sense to say that punishing one competitor by making it pay 10 times more than its market share and then trebling it, while allowing a competing conspirator with a larger market share to retain the full benefit of its illegal conduct, results in a strong deterrence to members of an industry.

Furthermore, the validity of any argument regarding deterence must account for the motivating forces behind business decisions. Businessmen that are unaware they are potentially liable for their co-conspirator's damages cannot be deterred by a rule against contribution.

It is submitted by *amicus* Olson Farms that allowing contribution would not adversely impact the deterrent policy of the antitrust laws. First, it is as likely that informed businessmen are as willing to take a chance of going "scot free" and escape all liability as they are fearful of being liable for other co-conspirators' damages.

Second, as noted previously, many businessmen make their decisions completely unaware of the consequences of the co-conspirator laws. Usually it is not the top management of a company which violates the antitrust laws, but rather it is the middle level manager. As stated by one commentator:

> It is often the middle level managers, whose goals differ from those of top management, who make decisions that lead to antitrust violations. These managers seek their own advancement within the company and find an advancement tied to their ability to produce profits. They therefore may feel considerable pressure to undertake anti-competitive activity such as price fixing to maintain or increase profits. An increase in profits, albeit through an antitrust violation, would benefit the career advancement goal of middle level managers. The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the facts of violation. Under such circumstances allowing contribution would best deter antitrust violations, where it would increase the probability that the company will be held liable for those violations and hence increase the frequency of company sanctions against overzealous employees. Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1545-46 (1980) (footnotes omitted).

The correctness of the above statement was illustrated by *Cackling Acres,* in that the violations both proven and alleged occurred because of the actions of the Utah lower level managers and were not attributable to decisions from the corporate headquarters in California.

Third, treble damages themselves are a significant penalty even for a company's proportionate share attributable to participation in a price-fixing conspiracy. Plaintiffs tend to sue every defendent they can reach; and as one scholar noted, "Since damages are trebled, there is quite a sufficient quantum of liability to punish '[all wrongdoers] by forcing them to share the liability.' " Dobbs, *Remedies,* Section 10.7 at 704 (1973).

In addition to the trebling of damages as a deterrent, there are numerous state and federal criminal actions which may be brought against an antitrust violator and which are a part of the panoply of deterrent actions which can be used to deal with such violators. Two noted authors conclude that the most effective deterrent is prison sentences for corporate executives involved in antitrust violations. *See Baker and Reeves,* "The Paper Label Sentences: A Critique," 76 *Yale Law Journal* 621 (1977).

Fourth, the fact that contribution is allowable increases the probability that any co-conspirator will be discovered. Professor Corbett made this observation when he stated:

> [N]ot only would the existence of a right of contribution remove to a great extent the possibility of escaping liability entirely, making it less attractive for smaller companies particularly to join in any concerted violation, but it would in a sense add *vigor to the enforcement of the antitrust laws* by allowing the conspirators themselves to ensure that all those participating in the unlawful action are appropriately penalized. Corbett, "Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Rev.* 111, 137 (1962) (Emphasis added.)

Finally, there is a severe danger of overkill in the case of price fixing where "intent" is in fact not a prerequisite to civil awards and where a rational punishment may deter legitimate activity that is close to the line and threatens small companies at the expense of the large. Similarly, unjustified settlements force smaller companies to reduce the funds available for increased productivity in competing both nationally and internationally. Indeed, failure to remedy the current situation may contribute to the conglomerate merger movement. Antitrust Equal Enforcement Act of 1979: "Committee Report on Contribution in Antitrust Cases," p. 18, 96 Cong. 1st Sess. (1979).

The preceding arguments relate to intentional as well as unintentional violators of the antitrust laws. Given the fact that aggressive businessmen may intend to take actions lawful in themselves, but when combined with other intentional acts may also form the basis for an inference that the businessman intended a violation of the antitrust laws, it is not appropriate to consider a distinction on contribution based upon whether the conduct was intentional or unintentional.

The actions taken by Olson Farms found to be in violations of antitrust laws were performed by middle level managers, unaware of the law of conspiracy and the lack of contribution. The evidence clearly established that Olson Farms, in fact, entered a market in which a conspiracy had already been established. Just as in numerous cases, therefore, the legal effect of allowing or disallowing contribution would have had no consequences as to the actions taken by Olson Farms employees.

The lack of contribution, however, has now made these passive actions an extreme punishment even more than Congress intended through the treble damage provision of the antitrust laws. Olson Farms has been forced to pay nearly 10 times its share in the first case and, in the second case, to settle with the plaintiffs even though Olson Farms disclaimed liability and even though no

liability has been established. Certainly, under these conditions it cannot be said that allowing contribution would in any way affect the deterrent objectives of the antitrust laws.

POINT III.

ALLOWING CONTRIBUTION WOULD NOT SIGNIFICANTLY INCREASE THE COMPLEXITY OF ANTITRUST LAWSUITS.

The Fifth Circuit Court of Appeals in rejecting contribution voiced the argument that allowance of third-party claims may open a Pandora's Box of procedural problems. *Wilson Abraham Const, supra.* 604 F.2d 906. These arguments claiming a resulting increased complexity of federal antitrust lawsuits and the inability of plaintiffs to control their lawsuits are without merit.

Under Rule 42(b) of the Federal Rules of Civil Procedure trial judges are empowered to organize a lawsuit to serve the purposes of efficiency as defined by the equities. Separated claims and parties need not confuse or complicate a trial. *See Ford Motor Company v. Mulby,* 210 F.2d 137, 139 (4th Cir. 1954). Moreover, under Rule 54(b) the original plaintiff can obtain a final judgment on his claims even if separate claims for contributions are still pending.

A claim for contribution is not against a plaintiff but is against the other defendants. As stated by one commentator:

> The plaintiff need face no more issues than it might have faced against the original defendant, since intervenors or interpleaded third-party defendants should only raise the same defenses as the original defendants. Note, "Contribution in Private Antitrust Actions," 91 *Harvard L. Rev.* 1540, 1549 (1980).

Since it is a frequently employed tactic for an antitrust plaintiff to join as many defendants as may reasonably be expected to be liable, with a view to insuring full recovery, it is difficult to see how (the plaintiffs' burden) would be increased by permitting contribution. Corbett, "Apportionment of Damages in Contribution Among Co-conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Review* 111 (1963). This principle can easily be seen in the first Olson Farms case in which the claim for contribution was made after the plaintiffs' case had been finally adjudicated. In such lawsuits it is unlikely that the plaintiff would have any role whatsoever in determining the apportionment of the damages previously obtained.

Even as to those cases such as the instant one in which some defendants have settled or in which unnamed co-conspirators have settled, the determination of apportionment of damage awards either pro tanto, pro rata or by excluding a settling defendant's conduct from further litigation generally would introduce no new factual dispute into a case. These methods would not require the plaintiff to contest the settler's liability in order to preserve its award.

In the second Olson Farms case, for example, had three to four of the defendants elected to settle with the plaintiff these companies would no longer be parties to the court action but their share of the market and their actions would still remain facts to be proven by the plaintiff. Any judgment awarded could easily be apportioned among the various remaining and settling defendants based solely upon the evidence adduced at trial, with no increase in the burden in which the plaintiff would have had to carry.

For these reasons, any additional complexity in federal antitrust litigation would be minuscule when weighed against the serious inequity which now exists without the right of contribution.

POINT IV.

ALLOWING CONTRIBUTION IN ANTITRUST CASES WOULD NOT SERIOUSLY AFFECT THE SETTLEMENT OF SUCH CASES.

Attorneys for plaintiffs are concerned that contribution would seriously affect their ability to settle antitrust litigation. There is no doubt that the desire of defendants to settle would be curtailed with the allowance of contribution. However, the reason for the slowdown in settlement is simply that defendants could no longer be coerced and intimidated into settling because of their fear that continued presence in the lawsuit would result in enormous liability based upon industry-wide practice.

As stated by the committee report in the hearings for Senate Bill 1468:

> Plaintiffs' lawyers have testified that S.1468 will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of S.1468 would simply be to lessen the coercive nature of some of plaintiff's lawyers's negotiations, and that the only settlement S.1468 will discourage in the long run are those it is intended to discourage — namely, coerced settlements.
>
> In the earlier discussion the committee noted that as a matter of policy, it is necessary to balance the desire to terminate antitrust cases in as rapid a manner as possible with the rights of the defendants to utilize the courts to assert their innocence. Since the courts were established to resolve disputes, the parties should not be denied the opportunity to present their substantive case because of fear of liability for damages caused by others who have settled. Committee Report, *supra,* page 19.

Moreover, settlement generally should occur regardless of a contribution rule if both sides have the same

estimates of the probability that the defendant will be held liable, since they could avoid litigation costs and uncertainty by settling.

The allowance of contribution would eliminate the inequities as stated in Petitioner's Petition for Certiorari in which the amount each defendant must pay for settlement dramatically increases as each new settlement has been made. Contribution, as noted previously, also allows the innocent party to litigate to prove his innocence without the risk of assuming liability for all the damages caused by the actual wrongdoers.

Amicus Olson Farms believes that the right of contribution should be available to all defendants — both those who have unintentionally violated the law as well as those who intentionally acted. Moreover, defendants should be allowed to assert contribution during the plaintiffs' trial or in a subsequent action. Finally, *Amicus* believes that a rule apportioning damages based upon the percentage of the items forming the basis for the claim is the most equitable method.

In a proper case a court should be able to fashion a rule of contribution which will protect the rights of settling defendants. *Professional Beauty Supply, supra,* 594 F.2d at 1184. There have been numerous proposals made as to the manner in which apportionment of damages should be made in a contribution case involving the various types of defendants. These proposals including that of the Eighth Circuit, Senate Bill 1468, the American Bar Association and others are well-stated in Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1555-1561 (1980).

If this Court allows contribution in antitrust cases this Court must also formulate a formula to be applied in the various types of cases. *Amicus* Olson Farms again respectfully requests that this rule be formulated to include the situations occurring in the two Olson Farms cases or that such a rule be reserved until the proper case is before

this Court involving these types of situations.

In any event, however, any rule formulated by this Court in allowing contributions can only affirmatively support rational and equitable settlements which would no longer be subject to the abuses evidenced in the cases cited.

CONCLUSION.

Allowance of contribution in federal antitrust cases under federal common law is a significant step forward in the development of a fair and equitable procedure to simultaneously enforce the antitrust laws while at the same time respecting the rights of the offending parties. Since the manner in which contribution may arise is varied, this Court should formulate a rule designed to cover all such situations or should specifically narrow its opinion to the facts of the case at bar.

For the reasons asserted by *Amicus* Olson Farms in this brief, it is respectfully urged that this Court should reverse the Fifth Circuit Court of Appeals and permit contribution in federal antitrust cases.

Respectfully submitted this 27th day of August, 1980.

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NO. 79-972

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION

Petitioners,

VERSUS

ADAMS EXTRACT COMPANY, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF TEXAS INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

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NO. 79-972

IN THE
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OCTOBER TERM, 1980

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF TEXAS INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

Interest of Texas Industries, Inc. as Amicus Curiae in No. 79-972

The interest of Texas Industries, Inc. as ***amicus curiae*** in this matter is identical to that of the petitioners herein, Westvaco Corporation, Packaging Corporation of America and Georgia-Pacific Corporation. Texas Industries, Inc. submits this Brief as ***amicus curiae*** in favor of a rule recognizing the right to contribution under the federal antitrust laws.

Texas Industries, Inc. is the petitioner for writ of certiorari in ***Texas Industries, Inc. v. Radcliff Materials, Inc., Jimco, Inc. and OKC Dredging Inc.***, which bears docket No. 79-1144 of this Court. The issue presented to the Court in that petition is whether a defendant in a federal antitrust case may seek

contribution.

This Court has not acted on the petition of Texas Industries, Inc. in No. 79-1144 and it appears that the Court will not act on said petition until such times as 79-972, ***Westvaco Corporation, et al v. Adams Extract Company, et al,*** is decided. The positions taken before the United States Court of Appeals for the Fifth Circuit by petitioners herein, though supportive of the claim for a right of contribution in federal antitrust cases, present certain different legal arguments than did Texas Industries before the Court of Appeals for the Fifth Circuit. Additionally, the decision of the Court of Appeals for the Fifth Circuit from which petitioners herein sought their writ of certiorari merely followed, in a ***per curiam*** opinion, its earlier decision in ***Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.,*** 604 F. 2d 897, wherein it dealt at length with the various arguments presented by Texas Industries, Inc. Texas Industries therefore suggests that those arguments should be presented to and considered by this Court.

The history of the litigation leading to the petition of Texas Industries, Inc. to this Court for a writ of certiorari is as follows:

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry

of *nolo contendere* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against petitioner, Texas Industries, Inc. The complaint centers around alleged antitrust violations by Texas Industries and its alleged co-conspirators.

Interrogatories filed by Texas Industries, and answers thereto, revealed that the unnamed alleged co-conspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. It thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. (the successor to Jahnke Services, Inc.) as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12 (b) (6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust co-conspirators under the antitrust laws of the United States.

The District Court granted the motions to dismiss filed by the third-party defendants and entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Texas Industries timely filed its Notice of Appeal from the judgment of the District Court and on October 16, 1979, the Fifth Circuit handed down its opinion affirming the District

Court's dismissal of the third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979. The aforementioned petition for writ of certiorari was filed in docket no. 79-1144 of this Court.

SUMMARY OF ARGUMENT

The issue before this Court is whether contribution is available under the antitrust laws.

Although Texas Industries, Inc. is, according to the record in Civil Action No. 75-2820 on the docket of the United States District Court for the Eastern District of Louisiana, only one of four corporations who purportedly violated the antitrust laws, it was the only one sued by Abraham Construction Corporation. Thus, without a right to contribution, Texas Industries may be cast in judgment and have to pay all damages sustained by the plaintiff, trebled, that were allegedly caused by the joint action of Texas Industries, Inc. and its three alleged co-conspirators.

Texas Industries submits that the denial of contribution under the antitrust laws offends basic principles of fundamental fairness. The complaint filed below by Abraham Construction Corporation asserts violations of 15 U.S.C. 1. That law specifies that ". . . ***every person*** who shall make any contract or engage in any ***combination*** or conspiracy hereby declared illegal shall be deemed guilty of a felony. . ." (emphasis added), Thus, by definition, 15 U.S.C. 1 violations require actions of more than one person before liability may attach.

Texas Industries submits that a no-contribution rule, pursuant to which a plaintiff, by his arbitrary or random selection, may impose upon one the liability for damages caused by a combination of parties, violates basic principles of fundamental

fairness.

15 U.S.C. 1 creates a clearly defined class of persons at whom the statute is directed - namely, those who combine to violate the antitrust laws. A no-contribution rule permits a plaintiff to create, by his arbitrary action alone, a smaller sub-class - namely those he chooses to sue, or against whom he decides to execute a judgment. This lack of similar treatment among those situated in the same class plainly runs afoul of basic fundamentals of fair play. There is simply no logical basis for a rule that permits the shifting of a potentially devastating financial burden to only one among many whose actions violated the law.

A no-contribution rule also runs afoul of this Court's rejection of ***in pari delicto*** as a defense to antitrust violations. In ***Perma Life Mufflers, Inc. v. International Parts Corp.***, 392 U.S. 134, 88 S. Ct. 1981 (1968), this Court concluded that although a plaintiff who reaps the rewards of treble damages may be no less morally reprehensible than the defendant, the law encourages his suit to further the policy of the antitrust laws. A rule that could permit a party to sue in its own right for damages suffered in part as a result of its own actions plainly conflicts with a rule that would deny that same party the right to seek contribution when sued by others for the same actions.

In the absence of a right to contribution, at least one of the basic objectives of the antitrust laws is clearly thwarted. There are three basic objectives of the antitrust laws: (1) deterrence of violations, (2) compensation of victims and (3) deprivation of fruits of illegal activities. ***Illinois Brick Co. v. Illinois***, 431 U.S. 720, 97 S. Ct. 2061 (1977).

Arguments have been made both ways on the relative deterrent effect of a no-contribution rule. Texas Industries submits that a rule recognizing the right to contribution acts as a

more effective deterrent than does a rule denying that right. The knowledge that one *will* have to share in the payment of a plaintiff's damages is a much more effective deterrent to violations than is a rule whereby a party *may* escape liability by virtue of a plaintiff's decision not to sue him.

However, and in any event, *only* under a rule whereby the right to contribution is recognized will all violators be deprived of the fruits of their illegal activities. One who escapes with his ill-gotten gains intact may be easily tempted to try again.

The recent development of the right to contribution under the federal common-law has seen an almost uniform recognition of that right. This Court, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974) evidenced an intent to do away with the old common-law rule against contribution. There is no reason why the same rationale should not be extended to antitrust cases.

ARGUMENT

A. Denial of Contribution Under the Federal Antitrust Laws Offends Basic Principles of Fundamental Fairness

The irrefutable effect of a no-contribution rule under the Federal Antitrust Laws is that a potentially devastating financial burden can be imposed upon only one defendant, or upon only those defendants against whom a plaintiff chooses to execute a judgment, solely by the random and arbitrary decision of that plaintiff himself.

For example, under the facts present in this case with Texas Industries, a grand jury, sitting in the United States District Court for the Eastern District of Louisiana, handed down criminal indictments in January of 1973 charging Texas Industries, Radcliff Materials, Inc., Jahnke Services, Inc., Jimco Inc., with violating the antitrust laws. The indictment charged the

existence of an unlawful combination and conspiracy in restraint of interstate trade consisting of an agreement ***between the defendants*** to raise and stabilize the price of ready-mix concrete in the New Orleans area.

After conclusion of the criminal proceeding, Wilson P. Abraham Construction Corporation filed a civil action naming only Texas Industries and its former employee as defendants, tracking the allegations of the indictment. Thus, for its own reasons, known only to it, Abraham Construction Corporation by its own random and arbitrary decision, may, without benefit of contribution, impose potentially massive financial burden upon only one of alleged multiple offenders.

It has, of course, long been recognized that antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy to which they are a party. ***Lawlor v. National Screen Service Corp.***, 349 U.S. 322, 75 S. Ct. 865 (1955). The private plaintiff need not sue all co-conspirators; he may, instead, choose to proceed against any one or more of them. ***Northwestern Oil Co. v. Socony-Vacuum Oil Co.***, 138 F. 2d 967, ***cert. den.*** 321 U.S. 792, 64 S. Ct. 790 (1944). Some decisions have gone so far as to hold that a participant in an illegal conspiracy may be liable for damages caused by activities in which it neither participated nor benefited from. ***Twentieth Century Fox Film Corp. v. Goldwyn***, 328 F. 2d 190 (9th Cir. 1964), ***cert den.*** 379 U.S. 880, 85 S. Ct. 143 (1964).

However, notwithstanding the rulings of those cases, it is simply not logical to conclude that Congress could have intended that sub-class be randomly or arbitrarily created out of a clearly defined class, and receive special treatment under the antitrust laws.

The complaint filed against Texas Industries contained

allegations of violations of 15 U.S.C. 1. The provisions of 15 U.S.C. 1 specify that "*every person* who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony . . ." (Emphasis added). Under 15 U.S.C. 1, there must be an illegal *combination*. By definition, for there to be a violation of the statute, more than one person must be involved. One person cannot, by his individual action, violate 15 U.S.C. 1.

Thus, the class of persons at whom the punitive treble damages provisions of the Clayton Act, 15 U.S.C. 15, is aimed are those found guilty of violating the anti-trust laws. A no-contribution rule under the anti-trust laws clearly creates a sub-class within that class. The sub-class can be limited to those actually sued, or those against whom the plaintiff chooses to execute a judgment. This sub-class is defined solely by the random and arbitrary selection of a plaintiff. The severity of the burden imposed by such a rule could depend solely upon the number of defendants selected to be sued by a plaintiff or the number against whom the plaintiff chooses to execute. Nothing in the relevant statutes, nothing in the legislative history and nothing in the previous interpretive decisions of any of the courts suggest that Congress had such an intent.

It is suggested, therefore, that in imposing the requirement that there be an illegal *combination* for one to be held liable for a 15 U.S.C. 1 violation, Congress clearly intended that all who combine illegally be treated as members of the same class; treated equally in terms of the punishment provided therein and in the Clayton Act. Had Congress intended that those sued, or those against whom a plaintiff chooses to execute a judgment, would have to pay the total damages caused by the joint action of the parties, such an intent would have somehow been manifested in the statute itself.

Under a no-contribution rule, the lack of similar treatment

among those situated in the same class not only obscures the full objectives of the antitrust laws, it runs afoul of basic fundamentals and objectives of fair play.

This Court has recognized that fair play is the essence of due process. *Galvan v. Press*, 347 U.S. 522, 530, 74 S. Ct. 737 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693 (1954). If the antitrust laws are construed in such a manner as to place sole responsibility upon less than all wrongdoers to pay what is a joint obligation, and what is in effect far greater than his participation in the scheme, with no right of contribution, fair play has obviously been lost. There is simply no logical basis for shifting this potentially devastating financial burden to less than all whose actions violated the statute.

In *Barbier v. Connolly*, 113 U.S. 27, 5 S. Ct. 357 (1885), this Court observed that the Constitution intended that ". . . equal protection and security should be given to all under like circumstances", and ". . . that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . .". 113 U.S. 31.

Then, in *Hayes v. Missouri*, 120 U.S. 68, 7 S. Ct. 350 (1887), the Court decreed that equal protection ". . . requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both ***in the privileges conferred and in the liabilities imposed.***" 120 U.S. 71-72 (emphasis added).

Later on, in *Traux v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124 (1921), it said that the guaranty of equal protection ". . . was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as

clearly a denial of equal protection of the laws as to the latter class. . . " 257 U.S. 333.

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), the only appellate court decision to date recognizing a right of contribution under the antitrust laws, the Court of Appeal for the Eighth Circuit followed the direction of *Cooper Stevedoring Co. v. Fritz Kopke*, 417 U.S. 106, 94 S. Ct. 2174 (1974), wherein this Court concluded that "a *'more equal distribution of justices'* can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame". 417 U.S. lll.

The Eighth Circuit explained that "[t]he deciding factor in our decision is *fairness between the parties.* We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious *lack of sense and justice* in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone *because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.*" 594 F. 2d at 1185 - 86 (emphasis added).

The Eighth Circuit's logic is irrebuttable. Without a right of contribution, each defendant in an antitrust case involving joint action is exposed to the possibility of being compelled to pay all of the plaintiff's damages, trebled, while others, equally liable, pay nothing. The result of such exposure in, for example, large national class action litigation could be overwhelming and could easily result in a reduction of competition itself by financially devastating one of multiple wrongdoers. Some defendants, though they may profess innocence, could nonetheless be confronted with the risk of potential liability based upon, for example, national sales of all defendants com-

bined, and could be forced to settle without regard to culpability.

There is an obvious lack of justice and fair play in allowing potential massive liability to be imposed solely by virtue of the random or arbitrary action of a plaintiff.

B. The Denial of Contribution is Inconsistent With the Underlying Rationale of this Court's Rejection of In Pari Delicto as a Defense to Antitrust Actions

A rule against contribution under the antitrust laws is patently inconsistent with the underlying rationale behind this Court's rejection of the doctrine of *in pari delicto* as a defense to antitrust claims.

The demise of the *in pari delicto* doctrine, which literally means "of equal fault", as a defense in antitrust cases apparently began in *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 61 S. Ct. 703 (1941), where a trade commission cease and desist order was upheld by this Court, thereby prohibiting certain garment manufacturers from boycotting retailers who copied their designs. This Court ruled that even if copying of designs was an acknowledged tort, that would not justify the antitrust violations.

Citing *Fashion Originators' Guild* as its authority, this Court ruled, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S. Ct. 259 (1951), that:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize

them against liability to those they injured.

340 U.S. at 214.

The disappearance of the *in pari delicto* defense in antitrust cases was finalized in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981 (1968). The principal question in *Perma Life* was whether plaintiffs in a private antitrust action could be barred from recovery by virtue of their own participation in the scheme. The plaintiffs operated Midas shops under sales agreements with Midas, Inc. They charged that Midas conspired with others in violation of the Sherman, Clayton and Robinson-Patman Acts. With respect to the Sherman and Clayton Act Claims, the Court of Appeals held that the claims were barred, noting that the plaintiffs had themselves enthusiastically sought the Midas franchise with full knowledge of the allegedly illegal terms of the agreements, had made enormous profits, had eagerly sought additional franchises, and had voluntarily entered into additional franchise agreements fully aware of the restrictions on products they could carry and on persons they could deal with, all of which they were now challenging as violations of the antitrust laws.

This Court disagreed with the Court of Appeals, pointed out that there was nothing in the language of the antitrust acts that indicated Congress wanted to make *in pari delicto* a defense, and concluded that:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, ***but the law encourages his suit to further the overriding public policy in favor of competition.*** A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U.S. at 139 (emphasis added).

This Court also observed, in *Perma Life*, that "the purposes of the antitrust laws are best served by insuring that the private action will be an everpresent threat to deter anyone contemplating business behavior in violation of the antitrust laws." 392 U.S. 139.

If, *in order to further the objective of the antitrust laws*, a participant in an unlawful scheme is not precluded from suing other participants in the scheme, and recovering damages caused in part by his own actions, no rationale can support the denial of that same participant's right to seek contribution in the event he is held liable to some third-party for the same actions. It follows, then, that a no-contribution rule is clearly inconsistent with the holding in, and the underlying rationale of, *Perma Life*.

C. The Availability of Contribution Promotes The Objectives of the Antitrust Laws

In *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 at 2075 (1977), where the issue was whether indirect purchasers can recover under the antitrust laws, this Court said:

> It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injuried by antitrust violations. Of course, as Mr. Justice Brennan points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation'. *Post* at 2082. But §4 has another purpose in addition to deterring violators and *depriving them of 'the fruits of their illegality'*, *Hanover Shoe*, 392 U.S. at 494, 88 S. Ct. at 2232; it is also designed to compensate victims of antitrust vio-

lations for their injuries."

This Court has, thus, viewed the objectives of the federal antitrust laws as threefold. They are designed to deter violations of the laws, to compensate the victims of anticompetitive activities, and to deprive those who violate the laws from the fruits of their illegal activities. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314, 98 S. Ct. 584 (1978).

As previously observed, it is well recognized that an antitrust plaintiff has historically been given the option of suing any one or all of the alleged co-conspirators. However, if a plaintiff, for whatever reason, chooses not to sue all alleged co-conspirators, some would thereby escape liability if they cannot be subjected to contribution. In such cases, the objectives of the antitrust laws would in large part be thwarted. Although the private plaintiff would be compensated for his injuries, assuming he has chosen solvent defendants, the alleged conspirators whom the plaintiff chooses not to sue would keep the fruits of their illegality, and, as to them, the deterrence of future anticompetitive activity would be substantially lessened.

The importance of depriving the antitrust violator of the fruits of his illegality was also recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224 (1968), where this Court said that:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by pricefixing or monopolizing *would retain the fruits of their illegality because no one was available who would bring suit against them.*

> Treble damage actions, the importance of which the Court has many times emphasized, ***would be substantially reduced in effectiveness.***

392 U.S. 494 (emphasis added).

Congress has already provided great deterrence under the antitrust laws in that those found guilty of violations will pay treble damages. However, ***the objective of depriving the tortfeasor of the fruits of his illegal acts can be assured only where there is a rule permitting contribution.***

A persuasive argument can also be made that, contrary to the rationale of the Fifth Circuit Court of Appeals, as expressed at 604 F. 2d 897, contribution enhances, rather than lessens, the deterrence objective of the antitrust laws. As the Eighth Circuit recognized in ***Professional Beauty Supply, supra,*** contribution means greater deterrence:

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tort-feasors may go 'scot free'. This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

594 F. 2d at 1185. The Seventh Circuit recently reached the same result in ***Heizer Corp. v. Ross,*** 601 F. 2d 330 (7th Cir. 1979), where it held that under the securities laws, apportioning the loss among all culpable parties enhances the deterrent effect of the judgment.

Moreover, as a practical matter, a person contemplating anticompetitive activities is much more likely to be cognizant of, and give consideration to, the treble damage exposure for violations of the antitrust laws than he is to the possibility that he may not be sued and thereby escape liability.

The denial of contribution would actually bring about a result totally anomalous to the very intent behind passage of the antitrust laws, which is to promote, encourage and protect competition. Permitting a plaintiff to shift total loss onto only one of multiple wrongdoers could, in many cases, actually deter and hinder competition by unduly burdening less than all of the equally guilty competitors.

Other potential adverse consequences of a rule against contribution must likewise be considered. The Seventh Circuit Court of Appeal recognized one significant danger in *Kohr v. Allegheny Airlines, Inc.*, 504 F. 2d 400, *cert. den.*, 421 U.S. 978, 95 S. Ct. 1980 (1975), where, though it was not considering contribution in an antitrust context, it noted the obvious lack of sense and justice in a rule permitting the entire burden of a loss to be shouldered by only one of several wrongdoers due to the plaintiff's whim or spite, "... ***or his collusion with the other wrongdoer,*** while the latter goes scot free". 504 F. 2d 405 (Emphasis added).

Texas Industries has no reason to suggest that there has been any collusion whatsoever between Abraham Construction Corporation and any of those whom Texas Industries sought to third-party for contribution. However, this Court must consider the limits to which a private plaintiff can go in choosing, among multiple conspirators, the one or ones he wishes to saddle with the burden of paying for his injuries. That limit must be consistent with antitrust policy. There should be no encouragement for parties injured by violations of the antitrust laws to collude with one wrongdoer against another in prosecuting his action, which in itself would be anticompetitive collusion against the one sued.

Without contribution there is no one who can bring suit against those whom a plaintiff chooses not to sue. As this Court recognized in *Perma Life Mufflers, Inc., supra*, a rule barring a culpable plaintiff from filing suit can diminish the

deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation. However, a rule barring contribution not only lets those not sued keep the fruits of their illegality, thereby creating an unjust windfall, it likewise reduces the pool of potential private attorneys general. Both results evade basic objectives of the antitrust laws.

D. The Right to Contribution Among Joint Tort-Feasors Has Evolved Under Federal Common Law and Should Be Applied Under the Antitrust Laws

One of the earliest cases in which this Court considered the question of contribution was *Union Stockyards Co. v. Chicago, Burlington & Quincy Railroad Co.*, 196 U.S. 217, 25 S. Ct. 226 (1905), where it was stated that:

> Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

196 U.S. at 224.

The source of this "well settled" general principle of law is unclear. One notable commentator suggests that the rule had its origin in the ancient English case of *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799). See Prosser, Torts 246 (2d Ed. 1955).

The rule survived for many years. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277 (1952), an admiralty case, this Court observed that:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they

> cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.

342 U.S. at 285.

After *Halcyon*, however, changing trends began to emerge, reflecting a growing approval of the right to contribution. The Third Circuit Court of Appeal rejected the *Merryweather* doctrine in *Gomes v. Brodhurst*, 394 F. 2d 465 (3rd Cir. 1967), where it analyzed the right to contribution this way:

> The first question is whether a right of contribution generally exists among joint tortfeasors. That no such right is recognized at common law has long been clear. See, e. g., *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (1799). Nor do we find reference to such a right in the statuatory or reported decisional law of the Virgin Islands. After extended consideration, however, we have decided that there is no compelling reason to defer or deny applying what we deem a rule of reasoned fairness. There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.

394 F. 2d at 467-68.

The Seventh Circuit Court of Appeal has flatly rejected the contention that there is no federal common law right of contribution. *Kohr v. Allegheny Airlines, Inc., supra.* In *Kohr*, which involved a mid-air collision over Indiana, the issue was whether the trial court properly dismissed a demand for contribution. First ruling that federal interests in regulating airways required

application of federal law with respect to the question of whether or not contribution was available, the Court then held:

> Having determined that a federal rule of contribution and indemnity among tort joint-feasors should control in aviation collisions, we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of 'no contribution'. We agree that '[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the palintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.'

504 F. 2d at 405.

This Court, in ***Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra,*** clarified the rule enunciated in ***Halcyon*** and went a long way toward recognizing a federal common-law rule of contribution. ***Cooper Stevedoring,*** as did ***Halcyon***, involved admiralty law. An employee of a stevedoring company sued a vessel owner for injuies sustained when he fell into a concealed gap between crates previously loaded by another stevedoring company. The vessel owner successfully obtained contribution from the first stevedoring company, which the latter asserted was in direct conflict with ***Halcyon***.

In rejecting that argument, this Court pointed out that in ***Halcyon*** the plaintiff was covered by the Longshoreman and Harbor Workers' Act and thus was barred from suing his employer. It further observed that when ***Halcyon*** sought contribution from the plaintiff's employer as a joint tort-feasor,

recovery was denied since the employer was statutorily immune from a suit by the employee and so could not be liable for contribution. The Court explained its ruling in *Halcyon* this way:

> Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

417 U.S. at 112.

In thus restricting the scope of the *Halcyon* ruling, this Court said that its decision in that case stands for a more limited rule than an absolute bar against contribution and that it should be read with its historical backdrop in mind. Then, with respect to contribution when there is no such statutory immunity, the Court reasoned that:

> Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate where two parties 'are both in fault, they should bear the damage equally, to make them more careful'. *The Alabama, supra,* at 697. And a 'more equal distribution of justice' can best be achieved by ameliorating the *common-law* rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 110-11 (emphasis added).

The underlying rationale of this Court's ruling in *Cooper*

Stevedoring seems clear. Where two or more parties are jointly at fault, damages should be borne equally to make them more careful. This rationale should be equally applicable in an antitrust context.

Indeed, the first appellate court decision involving the precise question of the availability of contribution under the federal antitrust laws recognized that right. ***Professional Beauty Supply, Inc. v. National Beauty Supply Inc., supra.***

Professional Beauty Supply, Inc., a wholesaler of beauty supplies, claimed that National, a competitor, had demanded that LaMaur, a beauty supplies manufacturer, grant it an exclusive dealership. Professional contended this constituted monopoly or attempted monopoly. National, in turn, demanded contribution from LaMaur, who filed a motion to dismiss for failure to state a claim, which was granted.

In reversing the District Court, the Eighth Circuit Court of Appeal held that under certain circumstances, a defendant in federal antitrust cases may be entitled to pro rata contribution from other joint tort-feasors. 594 F. 2d 1182. In reaching that result, the Eighth Circuit concluded that fairness between the parties dictated that contribution be available.

The Seventh Circuit Court of Appeal followed the rationale of both ***Cooper Stevedoring, supra,*** and ***Professional Beauty Supply, supra***, while holding that contribution was available under the securities laws. ***Heizer Corp. v. Ross,*** 601 F. 2d 330 (7th Cir. 1979). In reaching that conclusion the Seventh Circuit Court of Appeal observed that:

> The policy underlying the securities laws is reinforced by applying contribution. By apportioning the loss among joint wrongdoers ***the deterrent effect of the***

> ***judgment is felt by all culpable parties*** and the protected investor class has available to it a broader source of reimbursement.

601 F. 2d 332 (emphasis added).

Unlike previous cases involving the question of contribution under the securities laws, the Seventh Circuit found it unnecessary to determine whether a right of contribution should be implied under those laws:

> It is unnecessary to apply the four *Cort* tests to this implication of a remedy inasmuch as they have successfully been applied in order to imply a civil remedy under Rule 10b-5 in the first place. Contribution is ancillary to that remedy and it serves the same policy.

601 F. 2d 333.

No legitimate reason exists for application of a different standard under the antitrust laws.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Court of Appeals for the Fifth Circuit in both ***Westvaco Corp., et al v. Adams Extract Co., et al*** and ***Texas Industries, Inc. v. Radcliff Materials, Inc., et al,*** recognize the right to contribution under the antitrust laws, and remand the two cases for further proceedings.

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CERTIFICATE OF SERVICE

The undersigned counsel for Texas Industries, Inc., Benjamin R. Slater, Jr., certifies that a copy of the foregoing Brief *Amicus Curiae* of Texas Industries, Inc. has been mailed to the Clerk, United States Supreme Court and served on the parties listed below by depositing three copies thereof in the U. S. mail, postage prepaid, this _____ day of August, 1980, addressed as follows:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,
Petitioners,

VS.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

OBJECTIONS OF PLAINTIFFS-RESPONDENTS TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE.

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OBJECTIONS OF PLAINTIFFS-RESPONDENTS TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE.

Plaintiffs-Respondents oppose the motions of Milliken & Company, Milliken Research Corporation and Moulinage et Retorderie de Chevanoz (referred to collectively herein as "Milliken"), Texas Industries, Inc. ("Texas Industries"), Olson Farms, Inc. ("Olson"), and the Mead Corporation ("Mead") for leave to file briefs as *amici curiae*. For the reasons discussed herein, the *amici* motions in question do not satisfy the requirements of Rule 36.3 of the Supreme Court of the United States Revised Rules, because the motions do not "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties." Supreme Court Rule 36.3. Accordingly, Plaintiffs-Respondents have withheld their consent to the filing of these briefs and urge the Court to deny these motions.

Not one of the four motions for leave to file briefs as *amici curiae* sets forth questions of law which have not already been raised by the parties to this appeal. For example, contrary to the assertion by movant Milliken that "the briefs submitted by the parties on the petition for *certiorari* have contained relatively little discussion of claim reduction," Milliken motion at vi, the Response in Support of Petition for a Writ of *Certiorari* filed by respondents Weyerhauser Company and Willamette Industries, Inc., was devoted almost entirely to this issue. In addition, the merits briefs recently filed by petitioners have addressed this question at length. Westvaco Corporation ("Westvaco") Br. at 35-38; Georgia-Pacific Corporation ("Georgia-Pacific") Br. at 21-26; Packaging Corporation of America ("PCA") Br. at 5-8.

In addition to the redundancy of the claim reduction argument, Plaintiffs-Respondents oppose the Milliken motion, which deals solely with claim reduction, because claim reduction is not properly before the Court at this time. The question on which a writ of *certiorari* was granted is: whether defendants in antitrust cases may assert rights of contribution. There has never been a final order entered with respect to claim reduction. Therefore, when the petitioners attempted to appeal an earlier interlocutory order of the District Court, denying leave to assert claim reduction as a defense (Joint Appendix at 250-251), the Court of Appeals for the Fifth Circuit dismissed the appeal for lack of jurisdiction. Recently the claim reduction issue was taken up again by petitioners in the District Court, and the issue is presently pending before Judge Singleton.

It would be inappropriate to address the claim reduction argument at this time, before the Court has the benefit of the District Court's final order, and the benefit of consideration of the matter by the Court of Appeals. The question of claim reduction is not ripe for decision on the present record of this case. Furthermore, even if the Court were to permit contribution, the possibility of claim reduction would not have been fore-

closed. Therefore, the matter of claim reduction should be postponed until the District Court has rendered a final ruling and the question is properly posed for the Court's reasoned and thoughtful analysis. Because the Milliken brief dwells exclusively on this issue, Milliken's motion should be denied.

Mead's brief also fails to meet the requirements of Supreme Court Rule 36.3. The Mead motion concedes that "[its] interests in the contribution issue pending before this Court are identical to petitioners'." Motion at 3. Because Mead is a party in MDL 310, its factual circumstances are already before the Court, and it presents no additional facts or questions of law which petitioners have not already adequately briefed. *See* Westvaco Br. at 16-23, 31-34; Georgia-Pacific Br. at 5-21. Accordingly, its motion should likewise be denied.

Finally, the motions of Olson, Milliken and Texas Industries present no reasons for believing that the purported differences in their procedural posture and the legal arguments presented in their cases will not be adequately presented by the parties. Texas Industries' motion does not identify any legal arguments whatever which have not been adequately presented by the briefs filed by petitioners. *See* Westvaco Br. at 11-27; Georgia-Pacific Br. at 5-11, 15-26; PCA Br. at 4-5. Likewise, the purported procedural differences in the *Olson Farms* case (Olson motion at 4-5) are well known to the parties herein. That case and others in which similar procedural considerations have arisen have been extensively discussed by petitioners. *See* Westvaco Br. at 22-23, 25-27. These motions also fail to meet the requirements of Rule 36.3.

Eight briefs have already been filed with the Court in this case, and at least four additional briefs are scheduled for filing by the respondents later this month. It is also likely that the United States will file a brief on the merits of the contribution issue. If the *amici* briefs are accepted, opposing parties in each of those cases may be expected to seek leave to file briefs in

support of their positions and against the four movants. To grant movants leave to file their briefs would cause a profusion of purely cumulative briefs, none of which can reasonably be thought to be helpful to the Court's consideration of the issue presented.

Accordingly, the motions should be denied pursuant to Supreme Court Rule 36.3.

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Respectfully submitted,

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